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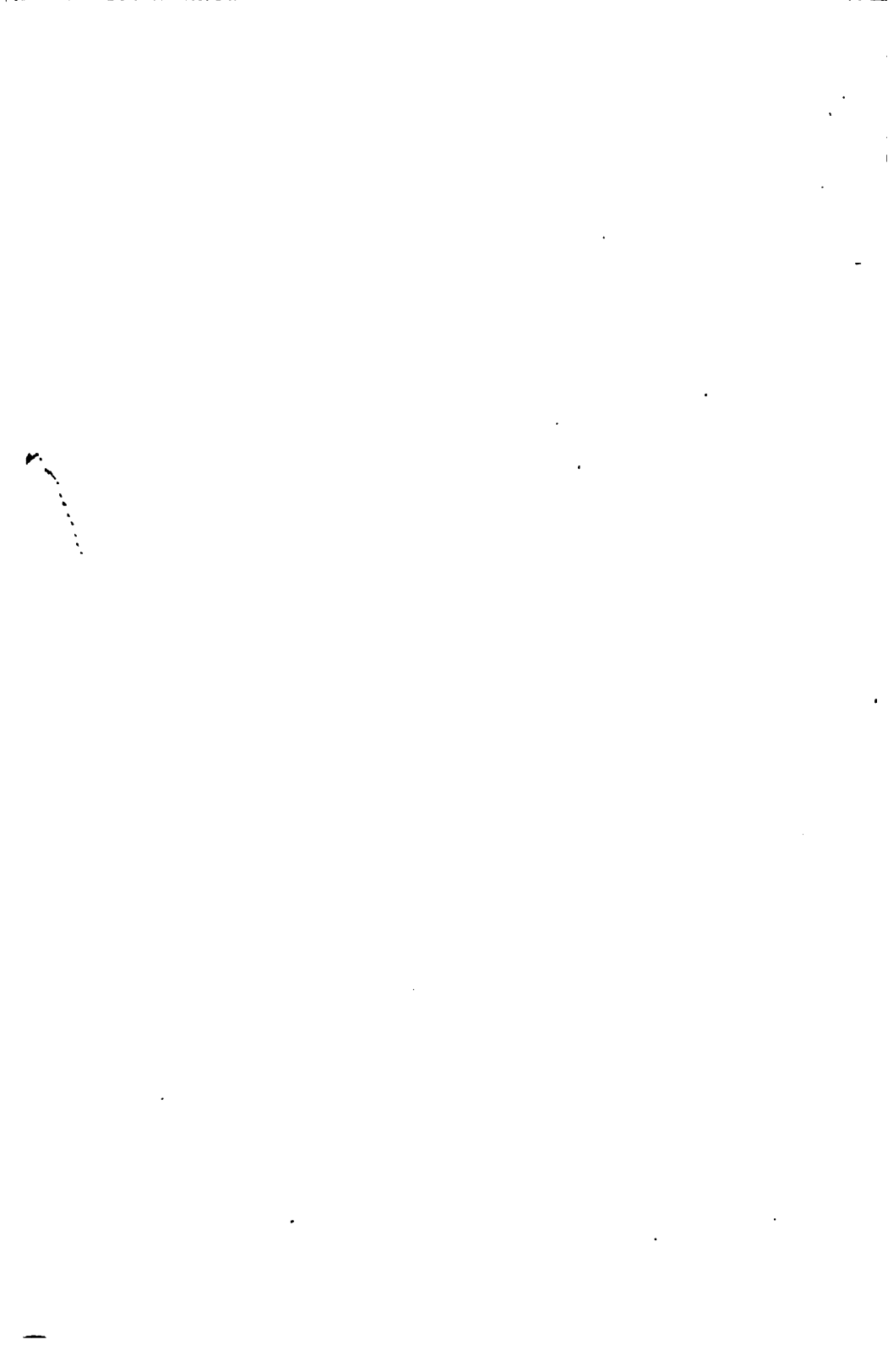
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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY TERM, 1889.

VOLUME XXVI.

WALTER A. LEESE,
OFFICIAL REPORTER.

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A. D. 1890,

BY WALTER A. LEESE, REPORTER OF THE SUPREME COURT,
In behalf of the people of Nebraska.

Rec. Sep. 19, 1891

THE SUPREME COURT

OF

NEBRASKA,

1890.*

CHIEF JUSTICE,
AMASA COBB.

JUDGES,
SAMUEL MAXWELL,
T. L. NORVAL.

OFFICERS.

ATTORNEY GENERAL,
WILLIAM LEESE.

CLERK AND REPORTER,
WALTER A. LEESE.

* On January 9, 1890, the court was reorganized, Chief Justice M. B. Reese retiring, Amasa Cobb succeeding him, and T. L. Norval taking the oath of office. The decisions reported in this volume were rendered under the former organization of the court.

DISTRICT COURTS OF NEBRASKA.

JUDGES.

FIRST DISTRICT.

JEFFERSON H. BROADY,	Beatrice.
THOMAS APPELGET,	Tecumseh.

SECOND DISTRICT.

SAMUEL M. CHAPMAN,	Plattsmouth.
ALLEN W. FIELD,	Lincoln.

THIRD DISTRICT.

ELEAZER WAKELEY,	Omaha.
GEORGE W. DOANE,	Omaha.
MELVILLE R. HOPEWELL,	Tekamah.
JOSEPH R. CLARKSON,	Omaha.

FOURTH DISTRICT.

A. M. POST,	Columbus.
WILLIAM MARSHALL,	Fremont.

FIFTH DISTRICT.

WILLIAM H. MORRIS,	Crete.
----------------------------	--------

SIXTH DISTRICT.

JEROME H. SMITH,	Aurora.
--------------------------	---------

SEVENTH DISTRICT.

ISAAC POWERS JR.,	Norfolk.
W. F. NORRIS,	Ponca.

EIGHTH DISTRICT.

WILLIAM GASLIN JR.,	Alma.
-----------------------------	-------

NINTH DISTRICT.

FAYETTE B. TIFFANY,	Albion.
T. O. C. HARRISON,	Grand Island.

TENTH DISTRICT.

FRANCIS G. HAMER,	Kearney.
A. H. CHURCH,	North Platte.

ELEVENTH DISTRICT.

JAMES E. COCHRAN,	McCook.
---------------------------	---------

TWELFTH DISTRICT.

MOSES P. KINKAID,	O'Neill.
---------------------------	----------

STENOGRAPHIC REPORTERS.

FIRST DISTRICT.

R. H. POLLOCK, Pawnee City.
P. E. BEARDSLEY, Lincoln.

SECOND DISTRICT.

O. A. MULLON, Lincoln.
M. E. WHEELER, Lincoln.

THIRD DISTRICT.

B. C. WAKELY, Omaha.
C. C. VALENTINE, Omaha.
A. M. HOPKINS, Omaha.
THOS. P. WILSON, Omaha.

FOURTH DISTRICT.

FRANK J. NORTH, Columbus.
E. R. MOCKETT, Fremont.

FIFTH DISTRICT.

C. L. TREVITT, Lincoln.

SIXTH DISTRICT.

FRANK TIPTON, Seward.

SEVENTH DISTRICT.

EUGENE MOORE, West Point.
GEORGE COPELAND, Neligh.

EIGHTH DISTRICT.

F. M. HALLOWELL, Kearney.

NINTH DISTRICT.

E. B. HENDERSON, Albion.
CHARLES W. PEARSALL, Grand Island.

TENTH DISTRICT.

JOHN W. BREWSTER, Hastings.
E. A. CARY, North Platte.

ELEVENTH DISTRICT.

A. D. GIBBS, McCook.

TWELFTH DISTRICT.

A. L. WARRICK, Ainsworth.

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOLUME XXV.

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ISAAC ADAMS.
I. R. ANDREWS.
HOMER C. ATWELL.
C. H. BALLIET.
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JOHN C. BARNARD.
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F. B. BEALL.
J. H. BERRYMAN.
GEORGE E. BERTRAND.
ALBERT T. BRASEL.
C. H. BRECK.
F. A. BROGAN.
W. K. BROWN.
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THOMAS S. NIGHTINGALE.
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JAMES W. ORR.
C. S. POLK.
GEO. W. POYNTON.
ALBERT S. RITCHIE.
T. E. SANDERS.
JNO. SCHOMP.
JOHN C. SHEA.
JAMES. B. SHEEAN.
GEO. W. SHEPPARD.
A. L. SQUIRE.
A. STEERE JR.
JOHN C. STEVENS.
W. J. STEVENSON.
RALPH W. STORY.
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JAMES H. VAN DUSEN.
H. D. WALDEN.
FRANK R. WATERS.
ANSON A. WELCH.
J. W. WEST.
JOHN A. WHITMORE.
A. G. WOLFENBARGER.
W. M. WOODWARD.
JAMES H. WOOLLEY.

RULES OF COURT.

ADOPTED SINCE THE PUBLICATION OF VOLUME XXV.

3. ORDER OF ORIGINAL CAUSES.—Original cases will be placed on the calendar of assignments for the proper district, and will not be taken up out of their order, except upon a showing that important public interests require an earlier disposition of the case.

7. TIME FOR ORAL ARGUMENTS.—In the oral argument of a cause, the time allowed the parties on each side shall not exceed thirty minutes, unless for special reasons the court shall extend the time. Oral argument on a motion will be limited to five minutes on a side.

8. NOTICE OF MOTION TO DISMISS.—Neither motions to dismiss, unless for want of prosecution, nor to strike a bill of exceptions, will be heard, unless the notice thereof shall be served upon the opposite party or his attorney, or the attorney who tried the cause for him in the trial court, at or before the expiration of the time for serving briefs in the case.

REPORTER'S NOTES.

While the name of the present Reporter appears upon the face and title-page of this volume, he does not desire to assume to himself the entire credit of the work.

At the time of his appointment as Reporter (and as such, *ex-officio* Clerk of the Supreme Court and State Librarian) immediately upon the death of his predecessor, the late Hon. Guy A. Brown, he found this work begun; a portion of the manuscript in the hands of the printers, and its general outline planned; the general arrangement, therefore, of former volumes has, in the main, been followed.

It is due to the memory of the late Reporter to state that the labor bestowed upon this volume by him is represented, principally, by the thought which evolved the catch-words immediately preceding the syllabi to each case reported. The remainder of the work—the index, tables of cases, and proof-reading for the whole volume—represent, in a degree, the labor of the present Reporter, who was assisted by Mr. Charles S. Lobingier.

The delay of a few weeks in the publication of this volume is due, in a measure, to the press of other official duties—among which is an almost continuous session of seven months of court, to which the Reporter has given his undivided attention as its Clerk.

WALTER A. LEESE,
Reporter.

Lincoln, June 2, 1890.

In Memoriam.

GUY ASHTON BROWN.

GUY A. BROWN, reporter and *ex-officio* clerk of the supreme court, died at his home in Lincoln, October 27, 1889.

MR. BROWN was born at Batavia, N. Y., in 1846. He entered the army in 1862, and remained until the close of the war, coming out commissioned as a captain, and a major by brevet. In 1867 he removed to Nebraska, and shortly afterwards was appointed clerk of the district court for Otoe county. In 1868 he was appointed clerk of the supreme court; was executive clerk of the house of representatives in 1873, and secretary of the constitutional convention of 1875. The latter body consolidated the three offices of clerk and reporter of the supreme court, and state librarian. To this position MR. BROWN was appointed, and continued to hold the same until his death.

At the session of the supreme court held on the morning of October 30, 1889, after the regular business had been transacted, Judge O. P. Mason presented, in behalf of the state bar, the following resolutions, which by order of the court were spread upon the records :

WHEREAS, It has pleased an all-wise Providence to remove from our midst GUY A. BROWN, for more than twenty years librarian of the state, clerk of the supreme court, and reporter of its decisions;

Resolved, That this event is one to be greatly deplored by the judges and bar of this court, and by all good citizens. To the various duties devolving upon him he brought a singular aptitude, and in their discharge he rendered a faithful and loyal service. He had, beyond many men, a love of books, so that he gave to the library the fond and wise care which has loaded its shelves with works of the first value and the best editions, and filled it with treasures rare, interesting and beyond price. Exact and precise in the use of our language, when

he was charged with stating the syllabi of the decisions of the court, he presented the points decided with accuracy and conciseness.

As clerk of the court, he never failed in answering the exacting demands of counsel, in assisting the judges in their onerous duties, or in administering his office in all ways beyond complaint.

Resolved, That the beauty of his character was even more attractive in private than in official life; while we shall never forget the gentleness of his mien and manners when exercising his duties as clerk, we cherish with affection and delight, the memory of him as a friend. His spirit seemed always chastened by respect both for himself and for others. In all that was pure, and true, and of good report, he seemed to live and move and have his being. Given to all good works and cherishing a love for all good men, and at the same time full of charity for those who were led astray, his life was a blessing and the memory of him will be an unfailing joy. He lived much in the church of his affections; he prayed for her peace; he served her with his best gifts of love, of labor, and of means. They who knew him in those sacred relations best know what manner of man he was.

Resolved, That while we dare not trespass within the hallowed precincts of his home, we venture to assure his widow and children of our sympathy in their affliction and that in the years to come we with them will cherish the memory, and endeavor ourselves to follow the good example, which has been left us by GUY A. BROWN.

Resolved, That the court be requested to spread these resolutions upon its records, and to adjourn its sittings so that the bar with the judges may attend the funeral.

JUDGE MASON addressed the court as follows:

It is with a sense of loss and personal bereavement that I announce the death of GUY A. BROWN, for something more than twenty years clerk of this court, and for many years past reporter and clerk of the court. MR. BROWN had adequate learning, untiring industry, a ready and retentive memory, clear comprehension of principles, a power of discrimination, and unquestionable integrity, and he brought to the public service, vigor, energy, and zeal, which deserved and commanded success and universal respect. But it is not alone as a capable lawyer and clerk that we think of MR. BROWN. His service to mankind was on a higher and wider field. I have known him when he stood manfully at the post of duty almost wholly alone between the "living and the dead," when he gave what nerve he could to timid and trembling imbecility and met the plotters of our country's ruin with a courage that never quailed and a devotion to country that never faltered. It was in the service of his country that the seeds of disease

were planted which finally ended his life. But he was a useful member of society not alone in the service of his country, but in church and state, and took a keen and lively interest in the intellectual and moral development of the community in which he lived. He brought to the public service a capacity for labor that seemed inexhaustible, unflinching courage, indomitable will, patience, and steady persistence, which no fatigue could weary, and no mistake or misfortune divest; a trust that never faltered; an integrity which corruption never dared approach, and a singleness of purpose which overcame all obstacles. But his useful life with us is ended. He leaves with us his memory and his example. He has gone — passed to that mysterious night of death by which all things earthly must inevitably become enveloped.

Let us cherish the fond hope, or cheerful delusion,—if it be a delusion,—that death opens the gate of fame and shuts the gate of envy after it; that it unloosens the chain of the captive, and puts the bondsman's task in another man's hands.

I am constrained to believe that in the broadest sense GUY A. BROWN was a good man; and death to a good man is but passing through a dark entry of one little dusky room of the Father's house, into another that is a fair, large, lightsome room, and glorious, and divinely entertaining. The loss is all ours — not his.

MR. ATTORNEY GENERAL LEESE:

It is certainly a sad and painful duty to inform the court this morning, that its reporter and chief clerk, GUY A. BROWN, has been summoned by the Great Judge on high, to render an account of his stewardship here on earth.

GUY A. BROWN, clerk of this court, died last Sabbath morning, at eight o'clock.

I am well aware of the fact that it has not been left for me, at this late day, to sound his praises, or to enumerate his merits. They both lie here in this court, a perpetual record, as a part of the history of the jurisprudence of this state. With the exception of the first three volumes, his name and fame stand out in bold relief on every report of this court's decisions, as a living monument to his perseverance, his energy, and his labor of love.

His death was not like that of the giant oak, that has been shattered to pieces by the force of the hurricane, but more in accordance

with the silver-leaved maple, that has been injured at its roots. At first, when the sap is beginning to fail, death is noticed at the ends of its extending branches, and each day, growing weaker and weaker, it becomes more noticeable as it approaches nearer and nearer the center; at last, it passes down the trunk to its roots, until the last faint spark of life expires.

Several years ago the fatal blow was struck, and while it did not blast, yet it so shattered his frame that he did not recover, and ever since that time the sands of life have been passing away, one by one, until last Sunday morning they were all exhausted, and surrounded by his loved ones at home, his spirit took its flight.

The last sad words he ever spoke were, "I guess I'll go to sleep." Yes, he has gone to sleep; but it is that sleep that knows no awakening until time shall be no more.

In the death of MR. BROWN, his family has lost a loving husband and father, the State has lost an honored and respected citizen, and this court, a sober, honest, and faithful officer. And while the workings of the Great Harvester, in making His selections among the human family, are always dark and mysterious, yet I fully believe that He, who notes the fall of a sparrow, has had some object in the fate of GUY A. BROWN.

HON. J. M. WOOLWORTH:

MAY IT PLEASE YOUR HONORS: I cannot forbear saying a few words upon this occasion. The death of MR. BROWN is a personal grief to me. My association with him antedates his official relation to the court, long as that relation has existed. He came to Omaha as my clerk in 1872, and served me in that capacity until he was appointed to the office he has ever since held. Nor when he left my employment were our relations entirely severed. In several interesting capacities, we have been associated. But most of all there was the unbroken connection of a most valued and delightful friendship. It was always a pleasure to meet him here when my engagements brought me to the court; and to come and not find him in his place, and know that he will never fill it, will long be a sorrow to me.

He was singularly fitted for the duties of clerk of this court. He organized the business of the office and the system and methods he pursued, will long be followed here. He had accuracy, promptness,

reticence, knowledge of the principles of the law and modes of procedure, and an equable and amiable temper, which assured all who had business here of his best and most agreeable assistance. Above all, he knew no guile; no breath of suspicion obscured his reputation for the most exact, intelligent, and uncompromising honesty.

All this you know, and all the members of this bar know. Of another prominent and interesting feature of his character, I may well say a single word. He was a member of the same church to which I have always belonged, and it has been my happiness to meet him in her councils and administration. How he loved her hallowed ways, how devoutly he worshiped at her altars, how earnestly he prayed for her prosperity and peace, how liberally he contributed to her treasures, I cannot tell you here. The great blessing which that church bestows upon her children who humbly submit to her discipline, and reverently use her liturgy, was his to a rare degree — a chastened, loving, pure spirit.

When our end shall come, may we be as fit to meet it as our brother.

MR. CHIEF JUSTICE REESE:

It is not my design to add to or in anywise embellish the tributes of respect which have been paid to the memory of the deceased. It was my good fortune to know him long, and, of later years, intimately. The principal portion of his mature life was devoted to the business of the court and the building up of our now magnificent state library. While in the discharge of the duties imposed upon him as clerk of the supreme court, he was ever prompt, watchful, careful, and correct. In his intercourse with the members of the court and bar, he was affable, courteous, and obliging. No known duty was left undischarged; no unkind word was spoken; and in his transactions with those with whom his official position brought him in contact, he was at all times and upon all occasions the same upright, faithful officer.

As to his labors in reporting the decisions of the court, no word need be spoken; the reports are a sufficient monument and speak for themselves.

Our state library, built up largely under his watchful care and supervision, is a credit to our state, and, I doubt not, compares favorably with the libraries of older states.

12 IN MEMORIAM—GUY A. BROWN.

I am directed by my associates to order that the resolutions, which have been submitted, be spread at length upon the records of the court, and as a mark of respect to the memory of the deceased, that the court do now adjourn.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1889.

PRESENT:

HON. M. B. REESE, CHIEF JUSTICE.
" AMASA COBB, } JUDGES.
" SAMUEL MAXWELL, }

FERDINAND STREITZ, APPELLANT, V. JOHN GEORGE
HARTMAN, TRUSTEE, CHRISTIAN HARTMAN, SUS-
ANNA W. VON BARRIES, EDWARD AINSWORTH, WAL-
TER BLACK, GUDBRAND OLSEN, WILLIAM E. CLARK,
MORRIS MORRISON, AND OMAHA SAVINGS BANK,
APPELLEES.

[FILED FEBRUARY 27, 1889.]

1. **Conveyance: TRUST DEED.** When there is nothing upon the face of a deed from a trustee to a purchaser, showing that the sale was made in violation of or contrary to the power contained in the deed of trust, a subsequent purchaser, who has no notice in fact of any irregularity in the sale by the trustee, will be protected as an innocent purchaser.
2. —: **CASE STATED.** A tract of real estate was conveyed to a trustee on the 31st day of January, 1865, in trust for the use and benefit of and to be conveyed by the trustee to each member

of a Homestead Society, according to their several interests therein. In 1868 the property was platted as an addition to the city of O. Soon after that time a number of the members of the Homestead Society met in the city of O. and divided the property, deeds being made to them, by the trustee, according to their several interests. A number of lots remained unconveyed, for the reason that the persons entitled to them could not be found. In 1869, 1873, and at other periods, it became necessary to sell a portion of the unconveyed lots for the payment of taxes on and the preservation of the remainder of the trust estate. The sales were all made for value, and the funds arising applied to the object for which the sales were made. The purchasers reconveyed the property for full value, and at the commencement of the suit, the lots were in part held by grantees in good faith, and without actual notice of any deviation from the terms of the trust, while others held under purchases for value, but with such notice. No actual fraud was shown. At the time of the commencement of the action, there were sufficient unconveyed lots to satisfy the shares in the Homestead Society held by plaintiff as assignee.

It was *held*, that plaintiff had no equities as against such subsequent purchasers, whether with or without notice, as would entitle him to ignore the unconveyed lots and recover title to the lots previously sold.

3. **Trusts: LIMITATIONS.** While the statute of limitations does not run in favor of a trustee where the trust estate is created by privity of contract, yet where such relation exists by act of law, as where a trust estate is traced into the hands of a defendant, the statute of limitations will run in favor of the persons charged with such trusteeship.

APPEAL from the district court of Douglas county.
Heard below by WAKELEY, J.

Warren Switzler, for appellant, cited: *McKesson v. Hawley*, 22 Neb. 696; *Pettit v. Black*, 13 Neb. 153; *Whitehorn v. Cranz*, 20 Neb. 398; *Wade*, Notice, secs. 17-21; *Perry*, Trusts, secs. 18, 19; *Willard's Eq. Jur.*, sec. 186.

Congdon, Clarkson & Hunt, for appellee Hartman, cited: *Perry on Trusts*, sec. 830; *Pomeroy's Equity*, sec. 754; *DeBussche v. Alt*, L. R. 8 Ch. D. 286, 314.

Gregory, Day & Day, and *O'Brien & O'Brien*, for appellees Ainscow, Olsen, and Swanson, cited: Perry on Trusts, 3d. Ed., secs. 141, 228, 230, 850, 869.

Montgomery & Jeffrey, for appellee Black.

REESE, CH. J.

This action was instituted in the district court of Douglas county, and was for the purpose of setting aside certain conveyances to the real estate named in the petition, and to require a conveyance thereof to plaintiff by John G. Hartman, who, it is alleged, held the same in trust for plaintiff, he being the assignee of certain shareholders, or members, of an organization known as the Homestead Society of Dubuque, Iowa.

The pleadings alone comprised over eighty pages of closely type-written matter in the record, and it would be impracticable to set them out, at length, in this opinion.

The opinion written by Judge Cobb, in *Killinger v. Hartman*, 21 Neb. 297, contains quite an extended historical sketch of the organization and actions of the Homestead Society, to which we refer as giving much information upon that part of the case.

It is alleged in the petition that soon after the land referred to as belonging to the Homestead Society had been divided into lots, a large majority of the shareholders selected lots and received from the trustee, Hartman, deeds therefor; that it was the custom and rule adopted by the members that those who first made application to said trustee, and presented him with the evidence of their interest, (their shares in the society,) were given deeds to the lot or lots selected by such shareholder, and that, by consent, the same became the rule governing the selection and granting of lots by the persons interested in the said society; that plaintiff is the owner of a number of shares and parts

of shares in said society, and that there are a number of lots belonging to the shareholders who have not yet received deeds therefor, among whom is the plaintiff; that prior to the commencement of the suit, he had notified defendant Hartman, trustee, that he was the holder of said shares, and that, as such shareholder, he had selected the lots described in the petition, they being a part of the land originally owned by said society and held by Hartman as trustee, and had demanded a conveyance of the lots so selected, which had been refused by the trustee, and that he still refused to make the required conveyance.

It was averred that a part of the lots so selected by plaintiff had been conveyed to the other defendants, severally, by the trustee, through *mesne* conveyances, but that the persons to whom the conveyances had been made, took the same with notice of the right of plaintiff and his assignors, and that whatever interest or rights they had obtained by the conveyance, were subject to the rights of plaintiff, and that he was entitled to the conveyance notwithstanding the prior conveyance to them, they not having been members of the Homestead Society, and that in making the conveyance, defendant John G. Hartman, trustee, had been guilty of a breach of trust, and was an unfit person to hold said office of trustee, and the prayer of the petition was that each of the defendants be required to set forth the manner in which they received the deeds referred to; that such deeds be declared null and void and in fraud of said trust, and that the trustee be compelled to make conveyance of the property to plaintiff; and that he be required to render an account of his trusteeship, showing the lots deeded by him, and to whom; whether the persons to whom conveyances had been made were shareholders in said society; what lots remained in his possession unconveyed; and that he be removed from said trust, or, in case he be retained, that he be required to give proper bonds, conditioned for the faithful discharge of his duties; or that, in case

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it should be finally determined that plaintiff is not entitled to the particular lots selected by him, that he be awarded other lots of equal value therewith, and that the trustee be required to make the proper conveyance.

After the filing of the answer of John G. Hartman, trustee, the plaintiff filed a supplemental petition, in which he alleged that subsequent to the commencement of the action he had acquired title to other shares in the Homestead Society by purchase, and substantially the same relief was asked as in the original petition concerning such shares.

The answer of John G. Hartman was in effect an admission of the organization and existence of the Homestead Society; his conveyance of lots to the owners of shares, so far as the same were selected; that plaintiff was not one of the original shareholders; and that he was not entitled to a conveyance; that the deeds referred to in the petition made to the other defendants, were for full consideration, and were made for the purpose of preserving the trust estate.

The answer of Christian Hartman in effect admitted the execution of a deed to lot number eighty-four, in Hartman's addition, to A. G. F. Hartman, and the conveyance of said lot by him to Christian, on the dates named in the petition, but denied all fraudulent intent, and alleged that the said A. G. F. Hartman paid the full value of said lot, at the time of his purchase and of the conveyance to him; and that he, Christian, paid to said A. G. F. Hartman full value thereof, at the time of his purchase and of the conveyance made to him.

It is also admitted that lot number seventy-nine was conveyed by the trustee to Charles H. Hartman, and by Charles H. to the answering defendant; but fraud was denied, and the allegation of the payment of full value on each occasion was made.

It was also alleged that at the times of the several conveyances, or soon thereafter, the deeds were duly recorded

in the proper recording office of Douglas county, and that plaintiff had full notice thereby; that after the conveyance from the trustee, the grantees had taken possession, and that defendant and his grantors had been continuously in possession of the property, had paid the taxes, and that the claim of plaintiff, if any ever existed, was barred by the statute of limitations.

The answer of the Omaha Savings Bank admitted the execution of a mortgage by Charles Ross to the defendant Morris Morrison, upon the east half of lot number fifty-five, and the assignment of said mortgage by Morrison to the bank; that said mortgage was for the purpose of securing the sum of \$850, with interest, due from Ross to Morrison, which mortgage, and the note accompanying the same, was purchased by the bank for full value; and that the bank, at the time of the filing of the answer, was the owner and holder thereof; and that it had no notice of the claim of plaintiff or any other person through whom plaintiff claims to have an interest in said property, the record title thereof appearing complete and in the defendant Ross. The allegations of the petition, so far as they effected the rights of the bank, were denied.

The answer of defendant Susanna Von Barries admitted the execution of the deeds from Redick and Hartman; the platting of the land into what is known as Hartman's addition to Omaha; the conveyance of the north forty feet of lot seventy-nine, through *mesne* conveyances, from John G. Hartman to her; denied the existence of fraud; alleged that she was the legal owner, and in possession of the property for a valuable consideration paid; that the deeds by which the several conveyances were made were placed upon record, by which plaintiff and his grantors have had notice of her rights; denied all notice of any claim of right on the part of plaintiff or his assignors at the time of her purchase, and alleged that the claim of plaintiff, by reason of her possession, was barred by the statute of limitations.

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By the answer of Walter Black, the title of John G. Hartman in the property, at the time alleged in the petition, was admitted, and it was admitted that Black was not a member of the Homestead Society. It was alleged that for full value previously paid, on the 3d day of December, 1881, said John G. Hartman deeded the property to the answering defendant; that since the year 1879, and since the said conveyance, defendant has paid the taxes and had possession of the property. All allegations of fraud were denied, as well as any knowledge of any rights of plaintiff or his assignor; and all allegations as to plaintiff's rights were denied.

By the answer of Gudbrand Olsen, the allegations of the petition were denied generally, and it was alleged that the north half of the east one-third of lot thirty in Hartman's addition to the city of Omaha, was purchased from defendant Ainscow by Olsen for full value, and a conveyance by warranty deed made therefor; that at the time of the purchase he had no knowledge of any alleged interest of plaintiff; that the title to the property, as shown by the records of Douglas county, was complete; and that the title thereto was in the defendant.

By the answer of Ainscow, the allegations of the petition were denied, and it was alleged that he purchased the east one-third of lot thirty in Hartman's addition, from Hartman, and received therefor a good and sufficient warranty deed, without any knowledge or notice of any alleged rights of plaintiff, and without notice that any person other than his grantor made any claim to said property.

The answer of Elias Swanson, referring to the south half of the east one-third of lot thirty, in Hartman's addition, was substantially the same as those of Olsen and Ainscow.

John G. Hartman then filed an answer to the supplemental petition of plaintiff, which also constituted an amended answer to the original petition. By it the con-

veyance from Redick to defendant of the land which afterward was platted as Hartman's Addition to Omaha, the platting thereof into eighty-four lots, and a reserve of about six and one-half acres; the issuance of eighty-three shares of capital stock by the Homestead Society; the selection by a majority of the members thereof, or their assigns, of lots in Hartman's addition, and the conveyance to them of the lots so selected, in the order of their selection; that defendant still holds, as trustee, a number of lots in said addition, the conveyance of lot thirty-four to A. G. F. Hartman, lot seventy-nine to Charles H. Hartman, the east one-third of lot thirty to Edward Ainscow, lot twelve and the north forty-three feet of lot thirteen to Walter Black, lot thirty-four to C. A. Weber, and lot fifty-five to Mary Arnold, were admitted. All other allegations of the petition were denied.

It was averred that on the 28th day of May, 1857, certain parties in the city of Dubuque, in the state of Iowa, associated themselves together as the Homestead Society, and that on the 30th day of the same month and year, their articles of incorporation were filed in the recorder's office of Dubuque county, of said state; that by the terms of said articles, the incorporation was to continue for the period of three years; that eighty-three shares of stock were issued; and that said corporation was dissolved on the 28th day of May, 1860, by the terms of its articles. The purchase of the property from Kountze, and the payment therefor of the sum of \$6,000.00, was made, that being all of the money paid into the corporation by the holders of the eighty-three shares of stock, and that after the purchase the land constituted the sole assets of the corporation; that the corporation at once subdivided the land mentioned into blocks and lots, and divided the same among the shareholders of the corporation, issuing a deed conveying three lots to each holder of a share, the shares being all taken up and the deeds issued in lieu thereof; that shortly there-

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after the covenants in the deed from Kountze and Ruth, the immediate grantors to said Homestead Society, failed, and the society was dispossessed of the land; that on the 8th day of September, 1858, the Homestead Society, by its proper officers, gave to defendant, who, at the time, was president of the corporation, and resided in Dubuque, a power of attorney, authorizing him to act for and in the stead of the society, and to take such course and proceedings at law or otherwise, with reference to the bond and deed by which the real estate was purchased and conveyed to the society, as in his judgment the circumstances of the case and the interest of the society should require, which power of attorney was duly recorded in the proper office, in Douglas county, Nebraska; that in obedience to the said power, he came to the city of Omaha, expended much time and labor endeavoring to adjust the matters in controversy between the society and Kountze and Ruth, but failing so to do, on the 5th day of October, 1858, he commenced an action in favor of the society and against Kountze and Ruth, in the district court of Douglas county, upon the bond referred to; that after many years of trouble and litigation, and on the 26th day of January, 1867, he compromised, and settled the controversy with Kountze and Ruth, and received in lieu of the land previously conveyed to the society, a warranty deed from John I. Redick for the real estate mentioned and described in the petition; that said deed contained the recital that the conveyance was "in trust for the use and benefit of, and by the said J. George Hartman to be conveyed to, members of the Homestead Society, at Dubuque, in the State of Iowa, in the proportions and according to the several interests in and to said premises to which said members are severally entitled, and not otherwise;" that after the settlement and conveyance, defendant took possession of the lands so conveyed and entered upon said trust; that from the commencement of the suit against Kountze and Ruth, in 1858, to the time

of the settlement thereof, in 1867, numerous original holders of shares in the Homestead Society, and assignees of others, came to Omaha, and as a result of conferences had by him with them, and by letters from members in Dubuque to him, he platted and laid out the lands received from Redick, into Hartman's addition, the plat containing eighty-four lots and a reserve of six and one-half acres; that said addition and \$20.00 in money constituted all of the property and money that he, as trustee, had at any time in his possession, and that at said time the lots so platted were of but little value; that he had no knowledge of the names or residences of all the parties interested, but that at meetings held in the city of Omaha, in 1868, by defendant and his associates residing in said city, and through letters received from interested parties in Dubuque and elsewhere, defendant was given the six and one-half acres as compensation for his services up to said time; and that immediately thereafter he entered upon said reserve, and has ever since lived upon the same and occupied it as his home; that at said meetings it was determined that defendant, as trustee, should deed a lot in Hartman's addition to each holder of a deed issued by the old corporation on a full share, but that the interested parties in Omaha should have the first selection of lots, and that defendant, as trustee, should deed all the other interested parties one lot for a full interest, in the order of their coming and demand for deeds; that the supreme court of Nebraska had found that at said meeting William Baumer, an interested party and the secretary of the old corporation, was given as compensation for his services, the eighty-fourth or odd lot, which was numbered thirty-two, and that thereafter, defendant, as trustee, made deeds to every interested party showing his interest and demanding a deed or deeds, and not knowing the names or residences of other interested parties, placed notices in English and German newspapers, calling upon all to come forward and get

their deeds; that to every interested party demanding a deed, he had made conveyances, except to plaintiff; but that he had refused to make deeds to plaintiff, by the advice of counsel, until such time as the court should instruct him in the premises.

The right of plaintiff to a deed or for an accounting was denied, subject to his establishing or proving his ownership of the interests as alleged in his petition, and subject to all rights lost by the lapse of time. But it was alleged that in case the court should find that plaintiff was entitled to a conveyance of any lots, as such owner of the interests named, there was real estate held in trust for such persons as would show a right thereto, and which he was willing to deed to plaintiff, if so directed by the court. A showing was made of the trusteeship, the expenditure of money and time by him in procuring the surveying and platting of the addition, and his expenditures in connection with the real estate, including a large amount of taxes paid, the compensation to which defendant should be entitled for his services during nineteen years while in charge of the property, the persons to whom deeds had been made in consideration of their membership in the original company, the persons to whom property had been sold for value, and the amount received therefor, the sum of \$3,200, in the county court of Douglas county, paid for the right of way by the Omaha & Southwestern Railway Company, from lots condemned. The numbers of the lots and a strip of unplatted land yet held by him in trust, are set out, by which it appears that in addition to the strip of unplatted land, lots fourteen, fifty, fifty-four, sixty-one, sixty-six, sixty-seven, seventy-two, seventy-three, and seventy-eight, were not yet sold nor conveyed. It was alleged that defendant had no means of knowing the number of or names of persons entitled to the conveyance of said property; that he had never had in his hands any money belonging to them, and that for twenty years he had been ready and

willing to perform his trust; that he had only been able to preserve the property and the title thereto by the payment of the taxes annually as they accrued, by selling the lots sold to persons not members of the society, for that purpose, he not having the funds of his own necessary to meet said payments and preserve the property. An accounting was demanded, with the prayer that the interests of the parties be ascertained; that a sufficient portion of the property be sold to meet the expenditures made by him out of his own funds, and pay him proper compensation for services; that the balance remaining on hand be ordered to be invested for the benefit of the parties entitled thereto; and that he be relieved from his trust.

For a reply to this and the other answers filed by the defendants, plaintiff denied the fulfillment of the trust by defendant, as alleged in his answer and the dissolution of the Homestead Society on the 28th day of May, 1860, or at any other time. It was admitted that the society subdivided the lands acquired from William Ruth into blocks and lots, and divided the same among the shareholders; but it was denied that the shares of the corporation were taken up and deeds executed in lieu thereof, or that certificates of stock were issued to the original shareholders of the homestead corporation, or distributed among them.

The failure of the title to the real estate obtained from Kountze and Ruth was admitted, as well as the execution of the power of attorney to defendant, and the institution of the suit against Kountze and Ruth, and the conveyance by Redick.

The allegation in the answer, that the real estate and twenty dollars in money constituted all the property received at any time by defendant, was denied, and it was alleged that large sums of money had been received by him.

That defendant was ever given the tract of land known as Hartman's reserve in compensation for his services, and

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his title thereto as against the rights of plaintiff, was denied. The correctness of the statement of the account contained in the answer, as well as his right to introduce the same in this action, was denied; yet plaintiff offers to refund to him all sums which he may have expended in payment of taxes upon the lots or fractions of lots selected by plaintiff, and for which the deed was demanded.

The other allegations of the answer were denied in substance, and it was alleged that instead of seeking to preserve the property, the trustee had squandered and dissipated the estate.

A trial was had to the court, which resulted in the following findings and decree:

"This cause came on for hearing on the petition, supplemental petition, answers, replies, and the evidence, and was submitted to the court, on consideration whereof the court finds:

1st. That the plaintiff Streitz is the owner of shares and parts of shares in the homestead society of Dubuque, Iowa, as follows: Full share number 23; full share number 44; full share number 51; full share number 40; full share number 72; one-third share number 64; one-third share number 88.

2d. That as such owner he is entitled to select and receive for each and every such full share and part of share from the defendant, John George Hartman, trustee, conveyances of one lot for each and every full share, and a proportionate part of a lot for each and every part of a share, in Hartman's addition to the city of Omaha, upon the payment by plaintiff of all taxes paid by said trustee, on each and every one of said lots and parts of lots, and shall recover costs in this action as against such trustee; to which finding and order said trustee, John G. Hartman, by his attorney, excepts.

3d. The court finds further that said Streitz is for one of said full shares entitled to, and the said trustee is here-

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by ordered to make, a trustee's deed to said Streitz, to lot fifty (50) in said addition; to which finding and order the said trustee, John G. Hartman, by his attorney, excepts.

4th. The counter claim of Christian Hartman, based on the failure of title to lot thirty-two (32) of said addition, is hereby dismissed without prejudice at the cost of said Christian Hartman; to which finding and order the said Christian Hartman, by his attorney, excepts.

5th. As to each and every of the defendants, except said John G. Hartman, trustee, and Christian Hartman, the court finds the issues in their favor, and this action as to them, and each of them, is hereby dismissed, with the costs incurred in each and every of the other defenses to be paid by the plaintiff; to which finding and order the said plaintiff, by his attorney, excepts.

6th. As against the plaintiff and all claiming under or through him by virtue of said shares or parts of shares, the titles to the full lots and parts of lots in said addition are hereby quieted and confirmed in the parties following, to-wit:

Lot thirty-four in W. E. Clark and his grantees; lot fifty-five (55) in Morris Morrison and his grantees; lots seventy-nine (79) and eighty-four (84) in Christian Hartman and his grantees; east one-third ($\frac{1}{3}$) of lot thirty (30) in Edward Ainscow and his grantees; north forty-three (43) feet nine (9) inches of lots twelve (12) and thirteen (13) in Walter Black; to which order and finding the said plaintiff, by his attorney, excepts.

Plaintiff appeals.

It will be observed that by the findings of the court, plaintiff is entitled to a conveyance of lot number fifty, which was originally selected by him, and that by virtue of his ownership of the shares in the Homestead Society, he is entitled to a conveyance of lots from the unconveyed portion of Hartman's addition, to the extent represented by such shares, but that he is not entitled to a conveyance

of the property held by or granted to the defendants named in the decree, their title thereto having been quieted. It therefore becomes necessary to examine only that portion of the decree which was in favor of the defendants who have purchased of defendant Hartman and hold deeds of conveyance from him. Lot thirty-four is held by defendant W. E. Clark. It appears, by the evidence, that on the 23d day of March, 1869, John George Hartman executed a deed of conveyance by which he granted and conveyed this lot to Louisa Frederick Dorothe Ehlers Fuchs. The following recital appears in the deed :

“And whereas, at a meeting of the said members of said Homestead Society, a division of said parcels of land into town lots was had and made proportionately to and among the members thereof according to the shares and interests of the respective members thereof; and whereas, by said division of said parcels of land, the lots of ground numbered as hereinafter set forth and described, were allotted and fell to the said Louisa Frederick Dorothe Ehlers Fuchs as her share, proportion, and interest in said parcels of land; and whereas, the said Homestead Society has requested the said J. George Hartman to execute and deliver to each several members thereof, a proper conveyance and release for the lots of ground so apportioned and allotted as aforesaid; now, therefore, this indenture witnesseth: that I, the said J. George Hartman, in the discharge of the trust reposed in me, and in consideration of the premises aforesaid, do by these presents grant and convey and confirm unto the said Louisa Frederick Dorothe Ehlers Fuchs,” etc.

This deed was duly recorded on the 19th day of January, 1870, and on the 10th day of November, 1886, Fuchs conveyed the same to Sarah Rosenberg by warranty deed, and on the 22d day of December of the same year, Rosenberg conveyed to Clark. These latter conveyances were made after the institution of this suit, but prior to the filing of the supplemental petition by which the title was

called in question, and, therefore, in so far as they were affected, prior to the commencement of the suit. It is shown that Clark purchased in good faith and with no actual knowledge of a conflicting claim, paying \$4,000 for the lot.

The original trust deed, from Redick to Hartman, contained the following recital after the conveying part of the deed: "In trust for the use and purpose following, that is to say: For the use and benefit of, and by the said J. George Hartman to be conveyed to, each member of the Homestead Society of Dubuque, in the state of Iowa, his heirs or assigns who are entitled thereto, according to his several interests in said premises, and not otherwise."

Aside from any discussion of the absence of equities in favor of plaintiff, the interests of Clark may be disposed of by reference to this conveyance alone.

Assuming that the recital in the deed from Redick to Hartman was notice to subsequent purchasers, yet it was not notice to the grantees of Fuchs that the trustee was not acting in accordance with the power conferred upon him in making the conveyance to her. The trust conferred upon him the right to decide, in the first instance, who were the members of the society and entitled to deeds. The deed to Fuchs recited that she was entitled to the conveyance by reason of her relation to the Homestead Society. Whether this was true or not, it is not necessary here to inquire, for the reason that Clark is shown to have purchased long after the conveyance to her, in good faith, without notice, and for full value. His title, therefore, cannot be questioned by plaintiff. (*Norman v. Towne*, 130 Mass. 52; *Gunnell v. Cockerill*, 79 Ill. 79; *Wilson v. Wall*, 6 Wall. 83.)

Lot number seventy-nine was conveyed to Charles H. Hartman by the trustee on the 27th day of August, 1873, and the deed was recorded on the same day in the proper records of Douglas county. Lot number eighty-four was conveyed to A. G. F. Hartman on the 20th day of July, 1869, the deed having been recorded on the 22d day of the

same month. These deeds contain substantially the same recitals as the one to Louisa Frederick Dorothe Ehlers Fuchs, hereinbefore referred to. But it appears that the grantees were not members of the Homestead Society, and were not entitled to the deeds for that reason. These lots were afterward conveyed to Christian Hartman, in 1882, who also had knowledge that they (the grantees) were not entitled to them as shareholders in the society. This being true, C. Hartman would not be protected by such recital; but as it appears that a part of lot seventy-nine was sold by Hartman to Spiegle within a year after his purchase, and there being no proof of Spiegle's knowledge, he would be protected. But aside from this, it appears that the lots were sold for full value, for the purpose of procuring money with which to pay the taxes upon the other portions of the estate, and more than ten years prior to the commencement of the suit. It is quite probable, therefore, that plaintiff's action would be barred by the statute even granting that C. Hartman, at the time of his purchase, had knowledge that the trustees had no authority to sell and convey to him, C. Hartman's, grantor. The rule seems to be, that as against the trustee the statute does not run; but where one becomes a trustee by construction of law, and not by privity of contract, as where he is held to be a trustee of property which he has fraudulently obtained, or where a trust estate is traced into his hands, or where a resulting trust arises, the statute runs from the date of the discovery of the fraud or the acquiring of the trust estate. (Perry on Trusts, sec. 865, and cases cited.)

By this rule the statute began to run at the time of the transfer of the trust property to A. G. F. Hartman and Charles H. Hartman, and plaintiff's right to recover would be barred under the provisions of section six of the civil code. Yet were this not true, we fail to see any equity in favor of plaintiff, which would entitle him to a decree avoiding this conveyance.

Soon after the property was platted, all of the owners who could be found, were notified, and a division was made by which they received the lots to which they were entitled. No division was made in favor of those to whom notice could not be given, and therefore the lots were held by the trustee for their benefit. Taxes accumulated more or less rapidly, and it became necessary that they should be paid, or the whole estate would be lost. The trustee had no means with which to make the payment; nor, indeed, was there any legal or moral duty devolving upon him to use his own means in that way. For the purpose, therefore, of preserving the estate, the lots were sold and the money applied to that use. Plaintiff is not deprived of any right by such sale, except, perhaps, the right of first choice, there being a sufficient number of unconveyed lots to satisfy the shares held by him. More than seventeen years after the platting of the ground, and nearly that length of time after the division, plaintiff demands that the title to the property conveyed for the purpose of making it possible for him to receive a portion of the lots, be now destroyed, in order that he may have a better choice than is afforded in the remainder of the property. We are unable to detect any equities in his favor.

Defendants Olsen and Swanson purchased each a portion of lot thirty from Edward Ainscow, who was the direct purchaser from John George Hartman, the trustee. It is shown that the sale was made to Ainscow in 1881, for the purpose of raising money to pay the taxes on the unconveyed portion of the estate; and while there is some proof that he had actual notice of an outstanding claim, yet this is denied by him, and the court no doubt found from the evidence that he had not. It is clear that Olsen and Swanson had no such notice, and that they purchased in good faith; their purchase, as well as that of Ainscow, was for full value.

What we have before said with reference to plaintiff's equities as against Hartman, must apply here as well as to

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the other defendants, who bought under similar circumstances, and need not be repeated.

From a careful examination of the whole case, we are entirely satisfied with the decree of the district court. It is therefore affirmed.

DECREE AFFIRMED.

THE other Judges concur.

LOU A. IZARD ET AL., APPELLEES, V. MICHAEL M.
KIMMEL ET AL., APPELLANTS.

[FILED MARCH 27, 1889.]

1. **Contract: CONDITION PRECEDENT: WAIVER.** A party may waive a condition precedent to the performance of a contract, after default; in which case he cannot insist upon the forfeiture provided for in the contract as the result of such non-performance.
2. ———: ———: ———: **SPECIFIC PERFORMANCE.** A purchased of B certain real estate, of which A took possession and agreed to pay the purchase price at stated periods, and to construct a building on the real estate purchased. By the terms of the contract, which was in writing, if the payments were not made at the time agreed upon, nor the building constructed, as required by the written contract, A should forfeit all right to the property, and B could take possession thereof the same as if no contract had existed. In an action by A for a specific performance of the contract, wherein it appeared that A had not complied with the agreement as to time of payment, but there was sufficient evidence before the district court to sustain a finding that by a mutual verbal agreement made during the existence of the written contract, the time for payment was extended, and A was to pay the whole purchase price instead of the partial payments named in the contract, and that he had made a tender of the purchase money within the time to which the payment had been extended, it was *held*, that he was entitled to a specific performance of the contract.

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3. ———: ———: ———: CONVEYANCE TO THIRD PARTY. In such case where B sold the real estate to C, after A had taken possession, A being in possession at the time of the sale, C was charged with notice of A's rights; and a conveyance to him after A's tender of the purchase price, in accordance with the new contract, was held invalid as against A.
4. **Contract: PERFORMANCE: CONSIDERATION.** The time of performance of a contract in writing may be extended by a subsequent parol agreement, and no new consideration is necessary, especially where there are mutual acts to be performed by the parties.

APPEAL from the district court of Lancaster county.
Heard below before CHAPMAN, J.

Sawyer & Snell, for appellant, cited: *Bacon v. Cobb*, 45 Ill. 47; *Field's Briefs*, vol. 5, sec. 407; 1 Pom. Eq. Jur., sec. 455; *Grigg v. Landis*, 4 C. E. Green, 350; *Grey v. Tubbs*, 43 Cal. 362; *Fry on Specific Performance*, sec. 711, and on page 415, note; *Rogers v. Saunders*, 16 Me. 99; *Waterman*, *Specific Per. Cont.* 596, 597, sec. 436; *Mott v. Richtmyer*, 57 N. Y. 50; *Singer Co. v. Forsythe*, 108 Ind. 334; 9 N. E. Rep. 372; *Carr, Adm'r, v. Hays*, 25 Cent. L. J. 32; *Fry, Specific Per.* 406, note 7.

R. D. Stearns, and *J. B. Strobe*, for appellees, cited: *North v. Kizer et al.*, 72 Ill. 172; *Bishop v. Busse et al.*, 69 Ill. 403; *Wheeler v. Knaggs*, 8 Ohio, 173; *Robinson v. Cheney*, 17 Neb. 673; *Post v. Garrow*, 18 Neb. 683; *Dickenson v. State*, 20 Neb. 81.

REESE, CH. J.

This action was commenced in the district court of Lancaster county, for the specific performance of a contract for the sale of real estate. As was alleged in the petition and shown by the proofs, the contract was in writing, dated the 13th day of September, 1886, and after its execution, and while plaintiff, as purchaser, was in possession of the

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real estate, defendants Kimmel and Van Duyn sold the same to defendant Scott, who is made a party to the action. The prayer of the petition is for a decree setting aside the conveyance to him, and for the enforcement of the contract between plaintiff and defendants Kimmel and Van Duyn.

The cause was tried to the district court, the trial resulting in a decree in favor of plaintiffs, from which defendants appeal.

The written contract, executed on the 13th day of September, 1886, is as follows:

"This contract made and entered into this 13th day of September, A.D. 1886, between Michael M. Kimmel and Charles R. Van Duyn, parties of the first part, and Lou A. Izard and Charles H. Izard, parties of the second part, WITNESSETH:

"That the said parties of the first part have this day sold to said parties of the second part, lot No. twenty-four, (24,) in Kimmel and Van Duyn's subdivision of lot No. four (4) of J. G. Miller's subdivision of the west half of the northeast quarter and part of the east half of the northwest quarter, of section number twenty-four (24) in township number ten, (10,) of range number six (6) east, 6th P. M., as the same appears of record on the recorded plat as part of city of Lincoln, in Lancaster county, Nebraska, for and in consideration of the sum of four hundred and five dollars, as follows, to wit: one hundred and five dollars to be paid at the end of three months, with interest at the rate of eight (8) per cent per year. It is also understood by and between the parties hereto that as a part of the consideration herein from parties of the second part to parties of the first part, that said parties of the second part are to build a dwelling-house to cost and be worth at least five hundred dollars, upon lot No. (24) of Kimmel and Van Duyn's subdivision as herein described, and to have the same completed at end of the three months, the time herein specified for the payment of the one hundred and five dollars; that if the

said parties of the second part fail to comply with this part of the contract, either to make the payment of \$105.00 when the same becomes due as herein specified, or fail to have the said \$500.00 house fully completed as herein specified, then the said parties of the second part, as a failure for their compliance with this contract, agree to waive all rights and claims they have under and by virtue of this contract, and that said lot No. 24 herein described shall revert to said parties of the first part free of all incumbrances and claims of right of said second party entirely, and that said first parties may take possession as fully and completely as if this contract had never been made.

"It is further understood between the parties hereto that at the end of the three months, if the said second parties have complied with the conditions of this contract providing for the payment of the said \$105.00 and the erecting of said \$500.00 building, then the said parties of the first part agree to convey said lot No. 24 of Kimmel and Van Duyn's subdivision, as hereinbefore described, to said second parties by a good and sufficient warranty deed, and the said second parties agree to execute to the first parties a mortgage deed securing the deferred payments of three hundred dollars; said deferred payments to be evidenced by two notes, one for \$150.00, due in one year, drawing interest at 8 per cent per annum from the date of this contract, and the other payment of \$150.00, due in two years, drawing interest at 8 per cent per annum from the date of this contract.

"In witness whereof the said parties have hereunto set their hands the day and year last above written.

"MICHAEL M. KIMMEL.

"CHARLES R. VAN DUYN.

"MRS. LOU. A. IZARD."

It appears from the evidence that the real estate in question, with other property, was placed in the hands of Squire C. Blazier, for sale, the price being \$450.00, terms of sale

as follows: "One-third cash; balance one and two years; interest 8 per cent. Five per cent off for cash; 5 per cent for building."

Plaintiff is the daughter of Blazier, and there is sufficient evidence to sustain a finding by the district court that Blazier, to induce plaintiff to purchase the lot, offered to allow her the benefit of his commission for making the sale, which was \$22.50, which, with the five per cent to be deducted for building, was deducted prior to the execution of the written contract, which left \$405.00 as the purchase price to be paid to defendants, and that after making the deduction, the contract was prepared fixing the price at the said sum of \$405.00.

In our view of the case, this is not a material consideration, although plaintiff sought to prove by this evidence the payment of \$45 on the purchase price.

There is no doubt but that the possession of the property was surrendered to plaintiff; and this, in connection with the fact of the agreement being in writing, signed by the party to be charged, would be sufficient to create a valid contract.

Soon after plaintiff took possession of the property, she commenced the construction of a dwelling-house thereon, which when completed was worth something over \$500; at least such was the testimony of some of the witnesses for plaintiff, the construction of the house being conceded by all parties.

Upon the trial, defendant sought to prove that the material and labor entering into the construction of the house had not been paid for, and that mechanics' liens had been filed thereon to the extent of nearly or quite the value of the house. This was held by the district court to be immaterial, and the evidence in the main excluded. In this holding we think the district court was correct. The purchase price having been tendered before the commencement of the action, it would therefore be a matter of no importance to defend-

ants whether the improvements had been paid for or not, as they would not be required to warrant against the same; and if the full purchase price was paid, they could not lose anything by the incumbrances placed upon the property by plaintiff.

Plaintiff and her witnesses testified that upon the expiration of the three months within which the first payment was to be made, she notified defendants that it would be impossible for her to make the payment upon its maturity and requested further time, which was granted, and that a new arrangement was made by which it was agreed that plaintiff was to pay the whole of the purchase price, less the sum of \$15, which was to be deducted on account of the payment in cash, the deed to be executed by defendants in accordance with the agreement. It was also claimed by them that they were informed by defendants that the time for payment would be extended until the 20th of January or the 1st of February, 1887, and that defendant had told plaintiff that they "need not be in any particular hurry about the payment," saying for her to take her time; that the middle of January or the 1st of February would answer. Prior to the 20th of February, defendant sold the property to Scott, who had at least constructive notice, by the possession of plaintiffs, of their rights. On the 17th day of January the purchase price, as alleged to have been agreed upon, to wit, \$390, was tendered to defendants and a deed demanded, which was refused. At that time the contract had been made with Scott, but the deed of conveyance had not been delivered to him. Soon thereafter the suit was instituted.

Strictly speaking, no legal tender of the purchase price was made. As defendant notified the party making the tender that they would not receive the money if tendered, in gold or other legal-tender money, a strict compliance with the law of tender was therefore waived.

It is insisted that by the terms of the written agreement,

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time was made of the essence of the contract, and that by the failure of plaintiffs to comply strictly with its terms, they forfeited all claims thereunder, and cannot now enforce it. This would be true, perhaps, were it not for the proof submitted to the district court tending to establish a waiver of the forfeiture by defendants. If the testimony of plaintiff's witnesses on this part of the case was correct, (and of this the district court was the judge, the evidence being conflicting,) the forfeiture was waived, and could not now be insisted upon. (*Thayer v. Mining Company*, 105 Illinois, 540; *North v. Kizer*, 72 Id. 172; *Waterman on Specific Performance*, Sec. 449.)

The time of the performance of a contract in writing may be extended by a subsequent parol agreement, and such extension will necessarily waive the right of the vendor to terminate the contract.

But it is insisted that this waiver or new contract was without consideration and therefore not binding. We think that no new consideration was necessary, since it would be merely a change of the existing contract, there being mutual acts to be performed by the parties under the new arrangement. (*North v. Kizer*, 72 Ills. 172; *Bishop v. Busse*, 69 Id. 403.) A state of facts was testified to by defendants, which, if true, might relieve them from a compliance with the contract as it originally stood, or even after its modification; but this was contradicted by plaintiffs in direct terms, and with the finding of the district court upon that part of the case we must be content.

It is said by defendants in their brief that a deed was taken by defendant to the clerk of the district court, on the day on which this appeal was taken, and that no money was in his hands to pay defendants according to the order of the district court, and it is suggested that defendants are entitled to some protection in their property rights. This is evidently true; and since the decree of the district court was "that upon payment of \$390 being made by said plaintiff-

iff to said defendants, Kimmel and Van Duyn, that the said Kimmel and Van Duyn convey the premises" to plaintiff, or in default of such deed being made, "upon payment of the said sum of \$390 into court for the use and benefit of said Kimmel and Van Duyn, this judgment have the operation and effect of said deed;" defendants could not complain, for the reason that they would not be required to make the deed until after the payment of the money. Their rights in that behalf were therefore protected.

The decree of the district court must be affirmed, in so far as it vacates the deed to Scott, upon the plaintiff's complying with the decree. And as to defendants, the decree will be modified to the extent of fixing the time within which the payment must be made. A decree will be entered in this court in favor of plaintiffs and against defendants, and requiring defendants, upon the payment of the said sum of \$390 to the clerk of this court within sixty days from the time of filing this opinion, to execute the conveyance, or in default thereof this decree will have the operation and effect of said deed. In case default be made in the payment of said \$390 within said sixty days, the cause will be dismissed at plaintiff's costs; the costs in this court to be divided equally between the parties.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

BARNABAS WELTON, PLAINTIFF IN ERROR, V. HENRY
DEYARMAN, DEFENDANT IN ERROR.

[FILED MAY 2, 1889.]

1. **Pleading: ANSWER: GENERAL DENIAL: EVIDENCE.** Under a general denial in an answer, the questions presented are the truth of the facts stated in the petition, and the only proper testimony is such as will tend to prove or disprove such facts; but where on a trial under such issue the plaintiff testifies to facts tending to show a settlement of some of the matters in difference, and the defendant without objection testifies that at a time stated all the matters in controversy were fully settled by the plaintiff and defendant, and this testimony is submitted to the jury and acted upon by it, an appellate court will not reverse the case because of the admission of such testimony.
2. ———: ———: **EVIDENCE: SETTLEMENT: AMENDMENT.** Where in such case, testimony tending to show a settlement is introduced by the defendant without objection, the answer should be amended to conform to the proof, and an appellate court to sustain a verdict which is clearly right, would, if necessary, order such amendment. Where, however, the plaintiff testifies to such settlement and the defendant to the same, the parties differing only as to the extent of the settlement, the case being tried without objections on issues made by the evidence, an appellate court will not disturb the verdict if clearly supported by the weight of evidence.
3. **Conversion: EVIDENCE.** In an action against a party for the cutting and conversion of wood, he denied the charge and introduced testimony tending to show that the wood claimed to have been taken from the plaintiff was procured from a third party named. *Held*, Not erroneous, but in corroboration of his denial that the wood was the plaintiff's.

、 ERROR to the district court for Holt county. Tried below before TIFFANY, J.

Utley & Benedict, for plaintiff in error.

G. M. Cleveland, for defendant in error.

MAXWELL, J.

The plaintiff's cause of action, as stated in his petition, is as follows: "The plaintiff complaining of the defendant says that on or about the 20th day of November, 1883, the defendant willfully cut down, removed, and carried away, from the premises of the plaintiff, situated in Holt county, in the state of Nebraska, a large quantity of wood, poles, and timber, and converted the same to his own use without the knowledge and consent of this plaintiff, to wit: Four loads of wood, poles, and timber, of the value of twenty dollars.

"2nd. The plaintiff further says that for a further cause of action the defendant is indebted to him in the sum of thirty-two dollars, as follows, to wit: Twenty dollars for the one-half value of one steer lost through the carelessness and neglect of the defendant; for three loads of hay valued at ten dollars, said hay taken from the premises of plaintiff by the defendant without the consent of the plaintiff; and two dollars for two log-chains, making in the aggregate the sum of thirty-two dollars; that said articles are reasonably worth the several sums charged herein, and that the defendant wholly refused to pay for the same."

The answer is a general denial.

On the trial of the cause, the jury returned a verdict in favor of the defendant, and the action was dismissed.

The testimony tends to show that on the 23d day of December, 1881, the plaintiff leased his farm to the defendant, with certain stock thereon, for a term of about two years and three months, the term to commence about February 1, 1882. The contract was reduced to writing, and seems to have been left in the care of the plaintiff, but at the time of the trial had been lost, and some of its terms were not very clearly proved. It does appear, however, that the defendant was to have one-half of the increase of the stock, and that about February 1, 1882, the defendant took possession

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under the lease, and remained in possession until the end of April, 1884, when the testimony shows that the parties had a settlement. The extent of this settlement is disputed. Plaintiff contends that it was merely partial, relating to the calves of 1884 as part of the increase of the stock, while the defendant testifies that it included all matters relating to the tenancy.

One of the principal errors relied upon is, that a proof of settlement was given without being pleaded.

The evidence, however, fails to show any objection to testimony relating to the settlement. The testimony of the defendant on that point, with the objection thereto, is as follows:

Q. At the time you had this settlement, where was this steer you took as your last choice?

A. He was not there; I don't know where he was. I found him a few days afterward; he had mired in a swamp. In regard to that settlement, it was all satisfactory when we closed our settlement. I wanted half of the third year's calves, and Mr. Welton objected to it. In fact, he said if we had to divide them calves he wouldn't agree to any other settlement at all. We could not settle at all unless I gave him all the calves.

Q. Did he state any reason why he wanted all those calves?

Objected to as incompetent, immaterial, and no proper defense under the pleadings. Objection overruled; plaintiff excepts.

A. He said that there had been several of them died; it would take the calves to make up the loss.

Q. You say that the settlement at the time it was concluded was perfectly satisfactory between you and Mr. Welton?

A. Yes, sir.

Q. Did Mr. Welton say anything about it being satisfactory at that time?

A. Yes, sir.

Q. What, if any, timber did you cut on said premises?

A. I cut one load and hauled it to Mr. Welton's. I cut and gathered it.

Q. To what place did you haul it?

A. Here to O'Neill.

Q. At whose request?

A. Mr. Welton's.

Q. Is that all the wood you cut on Mr. Welton's premises and hauled away from there during the time you remained on such premises?

A. Yes, sir.

It will be observed that no objections were made to proof of the settlement, the only objection being to the reason why the plaintiff demanded the calves.

This could not prejudice the plaintiff and is not ground of error. The plaintiff in his testimony states in effect that he would not have settled with the defendant in May, 1884, unless the defendant had relinquished his claim on the calves of that year. Where proof of settlement has been introduced without objection, and submitted to the jury, and acted upon by such jury, the party offering or not objecting to such testimony can not urge that objection in the appellate court as a reason for setting aside the verdict.

Where such proof is introduced by the defendant without objection, the answer should be amended to conform to the proof, and it is probable that an appellate court, for the purpose of sustaining a verdict which is clearly right under the evidence, would order this to be done. But the plaintiff is not in a position to insist upon such amendment, he, in support of his own case, having introduced proof tending to show the same, and the parties differing only as to the extent of the settlement.

The defendant in addition to testifying that he cut and sold no wood from the plaintiff's land, introduced testimony tending to show that he cut and sold wood from land

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of another, lying beyond that of the plaintiff. This is now objected to as an affirmative defense, and should have been pleaded. Had the defendant cut and sold wood off the plaintiff's land, he could not under a general denial prove any fact tending to show that he cut and sold such wood, and that he did so rightfully. Under a general denial that he cut the plaintiff's wood, however, he may disprove the facts stated in the petition, and in corroboration of his denial, may show that the wood alleged to have been procured from the plaintiff's land, was obtained from a third party.

The second objection, therefore, is unavailing.

The instructions were delivered orally by consent and cannot be reviewed.

There is no error apparent in the record, and the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

HENRY W. LLOYD, PLAINTIFF IN ERROR, v. J. F. REYNOLDS, DEFENDANT IN ERROR.

[FILED MARCH 27, 1889.]

1. **Practice in Supreme Court: JURISDICTION.** Where a transcript and petition in error are filed in the supreme court within a year from the date of the rendition of the judgment, and the adverse party voluntarily enters an appearance therein, after the expiration of the year, the case will not be dismissed for want of jurisdiction.
2. ———: **DISMISSAL OF ACTION.** Motion to dismiss the action should be filed before the preparation and service of briefs in the case, otherwise, ordinarily, they will be disregarded.
3. **Landlord and Tenant: MISTAKE IN LEASE: FORCIBLE ENTRY AND DETENTION: JURISDICTION OF JUSTICE.** One H entered

into an agreement with R. to rent his farm, and received \$150 for the year 1885; also a note for \$200, which the testimony tended to show was for the rent for the year 1886, and a second note for \$200, which the testimony tended to show was for the rent for the year 1887. In 1886 H. sold said farm to L., who had full notice of the rights of the lessee. In an action of forcible entry and detainer brought by L. against the lessee, it appeared that by mistake the lease was made to terminate March 1, 1887, instead of March 1, 1888, as intended by the parties. It also appeared that H. had delivered the note due in 1887 for rent, to L., who retained the same. *Held*, That while a justice of the peace or county judge could not grant affirmative relief by reforming the contract, yet he could receive proof of the mistake for the purpose of showing that the defendant was not wrongfully and unlawfully in possession of the premises.

4. **Verdict.** *Held*, That the verdict was clearly sustained by the evidence, and that there was no error in the record.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

A. Beeson, T. B. & S. J. Stevenson, and *A. N. Sullivan*, for plaintiff in error, cited: *Greenleaf* on evidence, 275; *Hamilton v. Thrall*, 7 Neb. 210; *Brondberg v. Babbott*, 14 Id. 517; *O'Leary v. Iskey*, 12 Id. 136; *Baier v. Humpall*, 16 Id. 127; *Rothe v. Rothe*, 31 Wis. 572; *Curtis & Co. v. Cutler*, 7 Neb. 317; *Caldwell v. Dickson*, 26 Mo. 61; *Thomas v. Thomas*, 15 B. Mon. (Ky.) 185; *Shepard v. White*, 11 Tex. 356; *Woodman v. Chesley*, 39 Me. 50.

Covell & Polk, for defendant in error, cited: *Wyche v. Green*, 11 Ga. 159; *Kerr* on Fraud and Mistake, 417; *Coquillard v. Hovey*, 23 Neb. 622.

MAXWELL, J.

This is an action of forcible entry and detainer brought by the plaintiff against the defendant in the county court of Cass county, where judgment was rendered. An appeal was taken to the district court, where on the trial a verdict

was returned in favor of the defendant, and a motion for a new trial having been overruled, judgment was entered on the verdict.

The attorneys for the defendant now move to dismiss the case, because no summons in error was issued and served within a year from the rendition of the judgment in the court below. The record shows that judgment was entered in that court on the 10th day of December, 1887; that a transcript and petition in error were filed in this court on the 10th day of October, 1888; that on the 17th day of December, 1888, the attorneys of the defendant entered into the following stipulation: "The issuance and service of summons in error in this cause is hereby waived by the defendant in error." This was duly signed. Briefs on behalf of the plaintiff and defendant were thereupon prepared and filed, and are now before us. The transcript and petition in error were properly filed in the court within the year, and the defendant could lawfully enter his appearance herein after the expiration of that time. In a number of cases this court has held that objections to the jurisdiction of the court must be made at an early period in the proceedings or they will be waived. There is no justice in subjecting a party to the costs incident to preparing briefs and appearing to argue a case upon the supposition that it is to be tried upon the errors assigned in the petition in error, and then, instead of such hearing, permitting the adverse party for the first time to raise the question of jurisdiction. When a transcript and petition in error are filed within the time required by law, the adverse party may enter a voluntary appearance after that time, and this may be done in any of the forms known to the law. The first objection, therefore, is overruled.

The testimony tends to show that in the year 1885, one R. O. Hoback was possessed of certain lands in Cass county, and that he entered into an agreement with the defendant to lease the same to him, as follows: "Agreement of lease

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made this 22d day of June, A. D. 1885, between R. O. Hoback, of Cass county, Nebraska, and J. T. Reynolds, of state and county aforesaid: The said J. T. Reynolds agrees to pay R. O. Hoback five hundred and fifty dollars (\$550⁰⁰/₁₀₀) for the rent of the said R. O. Hoback's farm and premises, including the growing crop of this year, 1885. Lease to commence June 22d, A. D. 1885, ending March 1st, A. D. 1887, the rent to be paid as follows: one hundred and fifty dollars June 22d, 1885; two hundred dollars August 15th, 1886; two hundred dollars August 15th, 1887; and said R. O. Hoback agrees to put necessary repairs needed; the said J. T. Reynolds agrees to deliver said premises to R. O. Hoback in as good repairs as he received it, subject to unavoidable accidents; said J. T. Reynolds is to have entire possession and control of said premises during the time herein mentioned; said R. O. Hoback agrees to furnish necessary wood for fuel during time of lease; said R. O. Hoback reserves the right to sell or move off said timber to any amount discretionary with said R. O. Hoback.

J. T. REYNOLDS.

R. O. HOBACK."

The agreement seems to have been drawn by the parties themselves. In June, 1886, Hoback sold the land in question to one Hammond W. Lloyd for the plaintiff, and indorsed on the back of the agreement for a lease the following: "Having sold and transferred the within land leased, and the notes given for the within rent money, I now also sell and assign and transfer for valuable consideration all my rights and claims in this lease and also do assign this lease to Hammond W. Lloyd, and I hereby authorize him to collect the rents and do all things and exercise all rights as to this lease and the within mentioned land, as fully as I would have done thereunder. R. O. HOBACK.

"Dated this 22d day of June, 1886, in presence of J. T. Greenwood."

The testimony tends to show that Hammond W. Lloyd,

the brother and agent of the plaintiff, called upon Mr. Reynolds before he purchased the land in question, and was informed by him that the lease ran until the 1st of March, 1888. Mr. Lloyd admits this to be the case, and that he was shown the lease, which, he says, had been changed from 1887 to 1888. The testimony also tends to show that the \$150 paid June 22d, 1885, was for the rent of the land in controversy for that year; that the first note of \$200 was for the rent of the land for the year 1886, and the second note for \$200 was for such rent for the year 1887. These notes were delivered to the agent of the plaintiff presumably for the use of the latter, so that without offering to return the latter note, he is seeking to deprive the defendant of the use of the land in question for the year 1887. The principal contention of the plaintiff is, that "As the parties have deliberately put their engagements in writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement of the parties, and the extent and manner of their undertaking was reduced to writing, all oral testimony of a previous colloquy between the parties, or of conversation or declarations at the time when it was completed or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected." This is true except in cases of fraud, accident, or mistake. When either of these have changed the terms of the contract, the facts in the case may be shown. But it is said on behalf of the plaintiff in error that a justice of the peace or county judge sitting as such, has no authority to reform contracts, and that on appeal the district court would have no jurisdiction to do so. This must be admitted; yet it does not follow that such courts could grant no relief. This is an action brought by the plaintiff against the defendant on the ground that he is unlawfully and wrongfully in possession of land of the

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plaintiff. Now, while the justice of the peace cannot reform the contract and grant affirmative relief, yet he may admit and consider the proof that a mistake was made in the date of the termination of the contract, whereby the defendant has been deprived of his rights, and that therefore he is not unlawfully and wrongfully in possession of said land. The law is to be used in enforcing and protecting rights of parties, and not as a pretext to deprive them of such rights. The questions of fact in the case were fairly submitted to the jury, the verdict is fully sustained by the evidence, there is no error in the record, and it is evident that the proper judgment has been entered.

It is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

JOHN ALEXANDER ET AL., APPELLANTS, V. ANNA BELL
ALEXANDER, APPELLEE.

[FILED MARCH 27, 1889.]

1. **Administration of Estates.** An heir or devisee of an estate cannot maintain an action for distribution or partition until the debts, allowances, and expenses against said estate, have been paid or provided for, unless he give a bond with approved sureties to pay the same.
2. ———: **PARTITION.** Where a widow has a life estate in all the lands of which her husband died seised, the heirs cannot maintain an action of partition against her and disturb her possession.
3. **Wills: PROBATE: JURISDICTION.** One A., being a resident of D. county, and possessing an estate therein, died in the year 1885. Shortly after his decease, an instrument purporting to be his last will and testament was duly filed in the office of the county judge of said county, together with a petition stating the neces-

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early facts and praying that said will might be probated. The county judge thereupon caused a notice to be published in a newspaper printed in that county, setting forth that a hearing would be had on said purported instrument at his office, on the 28th day of November, 1885, at 10 o'clock A. M. This notice was published on the 12th, 19th and 26th days of November preceding the hearing. *Held*, That a publication once a week for three weeks was sufficient to give the court jurisdiction, and that its ruling was not subject to collateral attack.

APPEAL from the district court of Dixon county.
Heard below before POWERS, J.

Wigton & Whitham, for appellant, cited: *Diston v. Hood*, 3 So. Rep. 747; *Abell v. Cross*, 17 Ia. 174, and cases; *Frazier v. Miles*, 10 Neb. 113; *Colton v. Rupert*, 27 N. W. Rep. 520; *Wade on the Law of Notice*, secs. 1334, 1335; *Patrick v. Leach*, 12 Fed. Rep. 661, 663; *Chase v. Ross*, 36 Wis. 268; *Roberts v. Flanagan*, 21 Neb. 503, 507; *Pelton v. Drummond*, 21 Id. 493, 495; section 895, Code of Civil Procedure; *Eaton v. Lyman*, 33 Wis. 34; *Loosemore v. Smith*, 12 Neb. 343; *Kirk v. Bowling*, 20 Id. 263; *Rorer on Judicial Sales*, sec. 1016.

Barnes Bros., for appellee, cited: 3 *Pomeroy's Equity Jurisprudence*, sec. 1388; *Hardy v. Mills*, 35 Wis. 141; *Wilkin v. Wilkin*, 1 Johns. Ch. 111; 1 *Central Law Journal*, 114; *Chase v. Ross*, 36 Wis. 268; *Morrow v. Weed*, 4 Iowa, 97-133; *Cooper v. Sunderland*, 3 Id. 135; *Roberts v. Flanagan*, 21 Neb. 503; *Fulton v. Levy*, 21 Id. 478; *Kirk v. Bowling*, 20 Id. 260; *Waples on Proceedings in Rem.*, 705, sec. 566.

MAXWELL, J.

The plaintiffs brought an action in partition against the defendant in the district court of Dixon county, and on the trial the court found for the defendant and dismissed the action.

The plaintiffs allege in their petition :

"1. That on the 22d day of October, 1885, one James Alexander died intestate, seised in fee of the following described real estate situate in Dixon county, Nebraska, to wit : the southwest quarter of the northeast quarter, and the southeast quarter of the southwest quarter, and the west half of the southeast quarter, of section twenty-six, township thirty-one, range five east ; and the east half of the southeast quarter of section thirty-four, township thirty-one, range five east ; and the north half of the northwest quarter, and the southwest quarter of the northwest quarter, and the southwest quarter of the southwest quarter, of section thirty-five, township thirty-one, range five east ; and the northwest quarter of the northwest quarter of section two, township thirty, range five east.

"2. Said James Alexander left as his only heirs at law the following persons, to wit ; John Alexander, brother of said deceased, aged sixty-two years, residing in Dixon county, Neb. ; Ellen J. Smith, sister of said deceased, residing in New Zealand ; James E. Alexander, aged sixteen years, and Maggie Beller, aged twenty years, both residing in Dixon county, heirs of one Thomas Alexander deceased ; said Thomas Alexander being a brother of James Alexander deceased, and Robert Alexander, since deceased.

"3. The defendant, Anna Bell Alexander, is the widow of said James Alexander, deceased, and as such widow has a right of dower in said real estate which has not been ad-measured.

"4. Plaintiffs John Alexander and Ellen J. Smith, as heirs of James Alexander, deceased, have each an undivided one-third interest in said lands, and said plaintiffs, James E. Alexander and Maggie Beller, as heirs of Thomas Alexander, brother of said James Alexander, deceased, have each an undivided one-sixth interest in said lands. Wherefore plaintiffs pray judgment confirming the shares of the parties as above set forth, and for a partition of said real estate

according to the respective rights of the parties interested herein; or, if the same cannot equitably be divided, that said premises may be sold and the proceeds thereof be divided between the parties according to their respective rights; and for such other relief as may be just and equitable."

The defendant in her answer "Denies that the said James Alexander died intestate, and avers the fact to be that said James Alexander made and left his certain last will and testament, and thereby and therein left all of the personal and real estate of which he died seised, to wit, that set forth in said petition, to this defendant, his widow. And defendant avers that said plaintiffs ought not to be further permitted to prosecute this their said action against this defendant, because she says that on the 28th day of November, 1885, by the judgment and consideration of the county court within and for said county of Dixon, the said will of said James Alexander was duly established, proved, and allowed, and the same was duly admitted to probate; that said judgment of said court now remains in full force and effect, and is in nowise reversed, modified, or set aside; that said plaintiffs had due notice of all of said proceedings, and made their defense to the said action to probate and establish the said will; that the defendant is the owner of and is in possession of the said lands under said will and decree, and plaintiffs have no interest therein."

It will be observed that the petition fails to allege that the debts due against the estate have been paid, or that distribution has been made as provided in the statute. Neither is there any allegation in regard to issue of the marriage of the defendant and the deceased, James Alexander. If there were no children, then the statute declares that the estate of the deceased "shall descend to his widow during her natural life." (Comp. Stat., chap. 23, sec. 30.)

Section 288, Chapter 23, Compiled Statutes, provides that "Before any partition or division of any estate among

the heirs, devisees, or legatees, as provided in this subdivision, the probate court shall make an allowance for the necessary expenses of the support of any children of the deceased under seven years of age; and it shall be the duty of the executor or administrator to retain in his hands sufficient estate for that purpose, except when some provision is made by will for their support.

"Sec. 289. After the payment of the debts, funeral charges, and the expenses of administration, and after the allowances made for the expense of the maintenance of the family of the deceased, and for the support of the children under seven years of age, and after the assignment to the widow of her dower, and of her share in the personal estate, or when sufficient assets shall be reserved in the hands of the executor or administrator for the above purposes, the county court shall, by a decree for that purpose, assign the residue of the estate, if any, to such other persons as are by law entitled to the same.

"Sec. 290. In such decree, the court shall name the persons, and the proportions or parts to which each shall be entitled, and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same.

"Sec. 291. Such decree may be made on the application of the executor or administrator, or of any person interested; but no heir, devisee, or legatee, shall be entitled to a decree for his share until payment of the debts and allowances and expenses mentioned in the preceding section shall have been made or provided for, unless he shall give a bond to the county judge, with such surety or sureties as he may direct, to secure the payment of the just proportion of such heir, devisee, or legatee, of such debts and expenses, or such part thereof as shall remain unprovided for, and to indemnify the executor or administrator against the same.

"Sec. 292. When such estate shall consist in part of real estate, and shall descend to two or more heirs, devisees, or

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legatees, and the respective shares shall not be separate and distinguished, partition thereof may be made as provided by law."

1. There is no claim that the debts, allowances, and expenses against the estate, have been paid or provided for, or that the plaintiffs had given bonds to secure the payment of the same. They, therefore, cannot maintain an action of partition or for distribution.

2. If the widow has a life estate in the lands mentioned, the plaintiffs cannot maintain an action of partition against her. She is entitled to the full possession and absolute control during her life of said estate, provided she does not commit waste thereon. And the plaintiffs would have no right to disturb her possession.

3. The third objection is that the will under which the defendant claims was a forgery and was never lawfully admitted to probate. The testimony shows that on the 9th day of November, 1885, an instrument was filed in the probate court of Dixon county, purporting to be the last will and testament of James Alexander, deceased. And at the same time one James G. Bailey filed a petition in said court, setting forth the necessary facts to give the court jurisdiction and prayed that the said will might be probated. The court thereupon caused the following notice to be published:

NOTICE OF PROBATE OF WILL.

JAMES ALEXANDER, DECEASED.

In County Court, Dixon county, Neb.

"The State of Nebraska to the heirs and next of kin of the said James Alexander, deceased:

"Take notice, that upon filing of a written instrument purporting to be the last will and testament of James Alexander, deceased, for probate and allowance, it is ordered that said matter be set for hearing on the 28th day of November A.D. 1885, before said county court, at the hour of 10 o'clock A.M., at which time any person interested may

appear and contest the same; and notice of this proceeding is ordered published three weeks successively in the *North-ern Nebraska Journal*, a weekly newspaper published in this state. In testimony whereof I have hereunto set my hand and the seal of the county court, at Ponca, this 9th day of November, A.D. 1885. W. C. SMITH,

“[L. s.] County Judge.”

This notice was published on the 12th, 19th, and 26th days of November, 1885. It is claimed on behalf of the plaintiffs that the court acquired no jurisdiction by such publication.

Section 140, chapter 23, Compiled Statutes, provides: “When any will shall have been delivered into or deposited in any probate court having jurisdiction of the same, such court shall appoint a time and place for proving it, when all concerned may appear and contest the probate of the will, and shall cause public notice thereof to be given by personal service on all persons interested, or by publication under an order of such court, in such newspaper printed in this state as the judge shall direct, three weeks successively, previous to the time appointed, and no will shall be proved until notice shall be given as herein provided.”

The words, “three weeks successively” evidently mean a publication once each week for three successive weeks—in other words, three weekly publications—and the last publication need not necessarily be twenty-one days from the date of the first. The record shows that James Alexander resided in Dixon county and died there, and that the estate is in that county. The county court of that county, therefore, had jurisdiction of the subject-matter, and by ordering a publication of notice of the time set for the hearing of the purported will, it acquired jurisdiction to determine the validity of such instrument. It is sometimes said that a probate court is a court of special and limited jurisdiction; but this is true only in the sense that it is restricted to certain matters, such as the settlement of the

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estates of deceased persons. Within its proper sphere, its judgments are entitled to the same respect as those of other courts; and, while it may err in construing a statute by reason of which it acquires jurisdiction, yet, unless there was an absolute want of authority to proceed in the case, its judgment, although erroneous, will not be declared void. This question was carefully considered in *Miller v. Finn*, 1 Neb. 258. In that case, in an action to foreclose a mortgage on real estate, the first publication was on the 16th day of June, 1860, and was continued thence four weeks, and the defendants were required to answer on the 30th day of July following, and the notice was held sufficient. It is said, page 289, "I think the rule is settled that when the subject-matter of the suit or controversy is within the jurisdiction of the court, the defendants may be made parties by publication, if non-residents, and if notice is thus given, and the court pass upon the sufficiency of the notice and affidavit which the statute requires to be made as to the fact of the non-residence of those who are notified by publication, neither the sufficiency of the notice nor affidavit can be questioned or reviewed collaterally."

In the case cited, the affidavit for publication failed to allege that summons could not be served upon the defendants within this territory. Yet the court held it sufficient as against collateral attack, the presumption being that a non-resident could not be served with summons within the state.

The rule as stated in *Atkins v. Atkins*, 9 Neb. 191, that, where there is a total want of evidence the court acquires no jurisdiction by the publication of the summons; but that where there is not an entire omission to state some material fact, but it is insufficiently set forth, the proceedings are merely voidable, appears to be the true one. Thus, suppose there had been but one publication, or a publication once in each week for two weeks, the court would have had no authority to proceed because the terms of the statute had not been complied with. But here were three weekly

publications, and the statute as construed by the court was fully complied with. If there is error in this ruling, it is subject to review at any time within one year from the making of the same. There is no claim of an attempt to conceal the time set for the hearing, as all the defendants within the state had due notice, and appeared and filed an answer and contested the validity of the will, and no appeal was taken by them. As to the defendants without the state, further publication was made, and the hearing continued to the 28th day of December, 1885. The court clearly had jurisdiction, and its judgment sustaining the validity of the will cannot be attacked collaterally. (*McCormick v. Paddock*, 20 Neb. 486.)

The judgment of the district court is clearly right, and is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

JOHN S. JONES, PLAINTIFF IN ERROR, V. WILLIAM
FRUIN, DEFENDANT IN ERROR.

[FILED MAY 2, 1889.]

1. **Pleading: ANSWER: GENERAL DENIAL: EVIDENCE.** Under a general denial in an answer, nothing can be given in evidence which does not tend to prove or disprove the facts stated in the petition.
2. **Malicious attachment: ONUS PROBANDI.** To sustain an action for malicious attachment of property, it is necessary to prove want of probable cause, malice, and damage to the plaintiff from the issuing of the attachment. (*Parmer v. Keith*, 16 Neb. 91.) Want of probable cause being shown, the question whether the defendant was actuated by malice is still one of fact for the jury.
3. ———. Petition examined, and held to state a cause of action.

ERROR to the district court for Red Willow county.
Tried below before GASLIN, J.

26	76
48	34
26	76
50	901

J. Byron Jennings, for plaintiff in error.

No appearance for defendant in error.

MAXWELL, J.

This action was brought by the defendant in error against the plaintiff in error, to recover for a malicious attachment of property. The answer is a general denial. On the trial of the cause a jury was waived. The cause "was submitted to the court upon the petition, answer, and evidence," upon consideration whereof the court found the issues in favor of the defendant in error, and rendered judgment in his favor for the sum of \$75; and a motion for a new trial having been overruled, judgment was entered on the finding.

An elaborate brief has been prepared and filed by the attorney for the plaintiff in error, in which a number of questions, including the advice of counsel, are discussed and authorities cited in support of each proposition. The answer, however, being a general denial, the only matter in issue is the truth of the allegations of the petition. (*The A. & N. R. Co. v. Washburn*, 5 Neb. 125; *Allen v. Saunders*, 6 Id. 436; *B. & M. R. Co. v. Lancaster county*, 7 Id. 33; *Jones v. Seward county*, 10 Id. 161; *Maxw. Pl. & Pr.*, 4 Ed., 128.)

It is said that the petition does not state a cause of action, and that is one of the errors relied upon. The petition is as follows: "The plaintiff complains of the defendant for that on the 4th day of March, 1886, the said John S. Jones, defendant, commenced in the Red Willow county district court an action by attachment against the plaintiff for the recovery of money damages, alleging in the affidavit therefor, and as grounds for said attachment, that the defendant in said action is a non-resident of the state of Nebraska; that said defendant fraudulently contracted the debt and incurred the obligation upon which suit was brought.

"The clerk of said court thereupon, by direction of the said John S. Jones, without requiring the said John S. Jones to file an undertaking as required by law, and upon the representation of the said John S. Jones and his attorney that no undertaking in attachment was required in such case, issued an order of attachment in words and figures, appearing in the certified copy of said order of attachment. * * * Pursuant to the commands of said writ, and at the request of the defendant in this action, the deputy sheriff of said county levied upon the following-named goods and chattels of the plaintiff, to wit: One bay horse, five years old; one roan horse, five years old; one set double harness, and one dray wagon.

"Said goods and chattels so taken by said officer were retained by him for a long time, to wit, forty days.

"The plaintiff further alleges that said order of attachment was wrongfully and maliciously sued out, and no just grounds existed for issuing the same, and the statements in said affidavit as grounds therefor, are false and untrue.

"On the 31st day of March, 1886, said attachment was dissolved by the consideration of Hon. William Gaslin, judge, and the property ordered discharged at the costs of the said John S. Jones.

"At the time said goods and chattels were levied upon, the plaintiff herein was engaged in the business of draying and delivering in the city of McCook, in which business the plaintiff used said goods and chattels, and by reason of said wrongful levy, the plaintiff was interrupted and hindered in his business for a long time, to wit, forty days, and this plaintiff's business wholly lost to him; that the team of horses, by reason of standing in the stable without sufficient exercise, were greatly injured and damaged. Plaintiff has been put to great expense and trouble in and about procuring the discharge of said attachment, and has been compelled to pay out a large sum of money as attor-

ney fees, and was greatly injured in his (plaintiff's) credit, by reason of said illegal suing out of said writ; all in the sum of two hundred dollars damages, as aforesaid sustained.

"Wherefore the said plaintiff prays judgment against the said defendant for the sum of \$200, his damages as aforesaid sustained, and costs of this suit."

Sec. 200 of the Code of Civil Procedure, provides that "When the ground of attachment is, that the defendant is a foreign corporation, or a non-resident of the state, the order of attachment may be issued without an undertaking. In all other cases, the order of attachment shall not be issued by the clerk until there has been executed in his office, by one or more sufficient sureties of the plaintiff, to be approved by the clerk, an undertaking not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained."

No undertaking was given in this case as required by the above section of the code.

Where any of the grounds for an attachment are other than that the defendant is a non-resident or a foreign corporation, an undertaking must be given. No doubt the clerk who issues an attachment in such case without an undertaking, is liable on his bond, but this does not exonerate the plaintiff in the action.

It will be observed that the allegations in the petition are, "That said order of attachment was wrongfully and maliciously sued out, and no just ground existed for issuing the same, and the statements in said affidavit, as grounds therefor, were and are false and untrue."

These allegations liberally construed, as required by the code, are equivalent to allegations of want of probable cause for suing out the attachment, and malice of the plaintiff in that action in procuring the order. The allegation as to damages from the issue of the attachment is

sufficient. The petition, therefore, does state a cause of action, and the objection thereto is overruled.

The principal objection to be considered is, Is the evidence sufficient to sustain the judgment? To maintain the action the proof must show a want of probable cause, malice of the defendant, and injury to the plaintiff. (*Parmer v. Keith*, 16 Neb. 91.) The want of probable cause is shown by the dissolution of the attachment and discharge of the property, and no complaint is made on that ground. The question of malice is more difficult to determine. The plaintiff in error testifies that in instituting the proceedings by attachment, he had no malice or ill will against the defendant in error, and if his statements are to be relied on, he was impelled by no unkind feelings, but by proper motives, in causing the attachment to be issued. The word "malice" he evidently uses in its ordinary acceptance instead of its legal meaning—"a wrongful act intentionally done without just cause or excuse." Malice in the legal sense is to be gathered to a great extent from the conduct of the party committing the alleged wrongful act. Thus, suppose A should strike B with a naked sword, or fire a loaded gun or pistol at him; it might be difficult to persuade the latter that no injury was intended, and the person committing the wrong need not be surprised if his assertions of good will, etc., to the party assaulted, were disregarded. So in the case under consideration. Here, so far as appears, was a groundless attachment—one of the alleged grounds therefor being that the debt was fraudulently contracted. This is a charge which is not to be made upon slight grounds, nor unless the party making it is prepared to sustain it.

An unsupported charge of this kind might ruin the reputation of a person of the utmost integrity, and require years to overcome the evil effects thereof. The attachment law is to be used as a shield for the protection of creditors, and not as a sword for the sole purpose of destroying the

debtor. The question of malice or the want thereof, is largely one of fact to be determined from the evidence.

The question of want of probable cause and malice are very fully considered by the supreme court of Wisconsin in *Collins v. Shannon*, 30 N. W. R. 732.

It is said: "When there is clear proof of want of probable cause for the institution of a prosecution in a criminal action, or for the issuing of a writ of attachment in a civil action, such want of probable cause may be *prima facie* evidence of malice. Still, in such case, the presumption of malice may be rebutted by the evidence. And when the proof of want of probable cause is of a doubtful character, so that the question must be left to the jury, it seems to us that there is no error in instructing the jury if they find that the defendant honestly and in good faith believed that the plaintiff was guilty of the offense charged, or that, in an action for wrongfully issuing an attachment, he honestly and in good faith believed that the plaintiff was about fraudulently to dispose of his property, so as to defraud his creditors, they should find for the defendant; because, if they so find, it will clearly be a finding that the act was not done maliciously, and so the plaintiff should fail in his action. (*Dietz v. Langfitt*, 63 Pa. St. 234, 240; *Flickinger v. Wagner*, 46 Md. 581, 603; *Cooley on Torts*, 185; *Vanderbilt v. Mathis*, 5 Duer. 304.)

In the last case cited the court say: 'Malice must be proved. There is no theoretical malice which can satisfy this rule, and which can coëxist with the established fact that the prosecution was instituted in an honest belief of the plaintiff's guilt, and with no other motive than to bring the offender to justice. The question of malice may be a turning point of the controversy in an action of this nature. The want of probable cause may be shown, and yet, upon the whole evidence in any given case, it may be a fair question for the determination of the jury whether the defendant was actuated by malice.'

The rule is undoubted that malice must be proved, but there was sufficient testimony in this case from which the court could find malice, and it having done so, this court cannot say that its judgment in that regard is wrong.

The proof as to damages is clear and undisputed, and neither the sum claimed nor the amount of the judgment is exorbitant.

The judgment is fully supported by the evidence, and is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

JOHN J. GILLILAN, PLAINTIFF IN ERROR, V. KENDALL
& SMITH, DEFENDANTS IN ERROR.

[FILED MAY 2, 1889.]

1. **Mortgage: CHATTELS: LIENS: GROWING CROPS.** A chattel mortgage upon growing grain, is not constructive notice to third parties of a mortgage on the same grain thereafter lawfully placed in crib or bin; and a dealer in grain who in good faith in open market purchases such grain from the mortgagor, and receives it at his warehouse, will take it free from the lien of the mortgage.
2. ———: **TITLE OF MORTGAGOR.** The mortgagor of chattels, until foreclosure, possesses a beneficial interest in the property mortgaged, and will convey a good title by a sale of such property to one who purchases in the open market in good faith and without notice, actual or constructive, of the mortgage.
3. ———: ———: **CASE STATED.** One A. executed a chattel mortgage to B., upon seventy-five acres of growing corn. This corn, apparently, was gathered by the mortgagor, with the knowledge or consent of the mortgagee, and placed in cribs or piles on the farm, and a portion afterward sold in open market by the latter. In an action by the mortgagee against the purchaser to recover the value of the corn, *held*, that a mortgage upon a growing crop is not notice to third parties of a mortgage upon corn husked and placed in cribs or piles.

26	82
33	738
26	82
36	624

26	82
40	806

26	82
153	329

ERROR to the district court for Lancaster county. Tried below before CHAPMAN, J.

Sawyer & Snell, for plaintiff in error, cited: *Herman on Chattel Mortgages*, secs. 81, 178; *Cool v. Roche et al.*, 20 Neb. 550; *Jones on Chattel Mortgages*, second edition, sec. 69; *Boone on Mortgages*, sec. 267.

C. E. Magoon, and *C. O. Whedon*, for defendants in error, cited: *Jones on Chattel Mortgages*, sec. 481; *Kreuzer v. Cooney*, 45 Md. 582; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108; *Robinson v. Holt*, 39 N. H. 557; *Hamilton v. Rogers*, 8 Md. 301.

MAXWELL, J.

This is an action by the plaintiff against the defendants, to recover for certain growing corn mortgaged by one Ashton to him, and a portion of which was gathered and sold to the defendants. On the trial the plaintiff recovered for the amount due Ashton upon the corn so sold. The plaintiff contends that he is entitled to recover for all the corn sold by Ashton to the defendants, although they had already paid Ashton therefor.

The facts are substantially as follows: One Ashton gave two chattel mortgages to the plaintiff in error, to secure payment of three of his promissory notes—one in the sum of \$61.30, another in the sum of \$225, and the third in the sum of \$44.50—which chattel mortgages covered the crop of corn which was growing upon the lands owned by the plaintiff, viz., the west half of section thirty, township eleven, range five, in Lancaster county. These chattel mortgages were duly filed for record in the office of the county clerk on the 3d day of July, 1885, and the 7th day of September, 1885, respectively. During the months of November and December, in the year 1885, the said Ashton

gathered and sold, without the knowledge or consent of Mr. Gillilan, a portion of the matured crop of this corn to the defendants, Kendall & Smith, who purchased the same in open market at their elevator in Malcolm, through their agent John Carpenter. Kendall & Smith are grain buyers at Malcolm, and it was admitted at the trial that they had no knowledge of Mr. Gillilan's lien upon the corn so purchased by them, except such constructive notice as the filing of the chattel mortgage gave them.

The plaintiff introduced the notes in question and the chattel mortgages securing the same, with proof that they were duly filed, and also testimony tending to show that the defendants had purchased from Ashton about 985 bushels of corn, and that such corn was worth, in the market at Malcolm, at the time stated, from nineteen to twenty-one cents per bushel. There is no testimony tending to show the entire quantity of corn produced by Ashton on the land of the plaintiff in section thirty, nor what portion of the crop, if any, Ashton was to deliver to the plaintiff for rent. For ought that appears, the amount of corn still remaining on the farm is sufficient to satisfy the mortgages in question.

The court instructed the jury as follows: "A party taking a chattel mortgage upon growing corn, in order to preserve his lien, as against innocent purchasers, is bound to see that when the corn is gathered, such notice is given to the public of his lien, by keeping the same separate and unmixed with other corn, as will prevent innocent parties from purchasing such corn. And in this case if the jury believe from the evidence that the plaintiff, after the execution of the mortgages offered in evidence by him, did nothing more than to file his mortgages in the office of the county clerk, and allowed the corn to become mixed with other corn, and if the jury further believe from the evidence that the defendants without actual notice of the existence of these mortgages purchased the corn, or some portion of

it, at their elevator in the town of Malcolm, in open market, then the plaintiff cannot recover, and your verdict will be for the defendant."

To this instruction the plaintiff excepted, and now assigns the same for error.

At law, a chattel mortgage passes the legal title in the property mortgaged to the mortgagee, although the mortgagor retains an interest in the property, and may redeem the same at any time before a sale under a foreclosure of the mortgage. In other words, a chattel mortgage is a security in which the legal title to the property mortgaged passes to the mortgagee, but in which the mortgagor retains a beneficial interest. Necessarily, additional labor must be expended on a growing crop to harvest and care for the same. If the mortgagee intrust this labor to the mortgagor, he, to that extent, makes him his employe. If the entire property in the grain had passed to the mortgagee on the execution of the mortgage, then it would be the business of the mortgagee to gather and care for the crop, and if he failed to do so, it would go to waste. Where, therefore, the mortgagor remains in possession and is permitted to gather the crop, it will be presumed that it was with the consent of the mortgagee. Now suppose that the security is considerably more than sufficient to pay the debt secured, and is the principal means possessed by the mortgagor for paying ordinary debts, and the means also of feeding his stock, and that such mortgagor is feeding his stock from such grain, and selling portions of the same to meet his necessary expenses, and these facts are known to the mortgagee, or he has knowledge of facts sufficient to put him upon inquiry: he certainly can not follow the grain and compel the party who has purchased and paid for the same in open market, to again pay him for such grain; nor could he claim a lien upon the stock for the grain used to feed it. If the mortgagor was a farmer, and the grain mortgaged included all that he possessed, and it was the intention of

the parties that he should continue in the use of the grain for feed or other necessary purposes about the farm as before the execution of the mortgage, it would not be a breach of the condition to carry out such intention, and the consent of the mortgagee may be implied; and so that the security shall remain sufficient, the mortgagee would have no cause of complaint. A mortgage of growing crops does not necessarily imply a mortgage of the same grain gathered and placed in a granary or crib—at least so far as constructive notice to be derived from the filing of a mortgage is concerned. The lien as between the parties continues, no doubt, but our statutes do not favor secret liens, and this court has so declared in a number of cases. (*Edminster v. Higgins*, 6 Neb. 265; *Rhea v. Reynolds*, 12 Id. 133.) A mortgage, therefore, of growing grain is not notice of a mortgage on grain in a crib or bin, when it has been lawfully placed there by the mortgagee or by the mortgagor with his consent. If wrongfully or unlawfully removed, the rule probably would be different.

At common law the purchaser of goods in market *overt*, if he acted in good faith, ordinarily was protected. Blackstone, Vol. II, 449, says: "But property may also, in some cases, be transferred by sale, though the vendor hath none at all in the goods; for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end. And therefore the general rule of the law is, that all sales and contracts of anything vendible, in fairs or markets *overt*, (that is, open,) shall not only be good between the parties, but also be binding on all those that have any right or property therein. And for this purpose, the Mirror informs us, were tolls established in markets, viz.: to testify the making of contracts; for every private contract was discountenanced by law; inso-much that our Saxon ancestors prohibited the sale of anything above the value of twenty pence, unless in open

market, and directed every bargain and sale to be contracted in the presence of credible witnesses."

It is not the policy of the law to extend the doctrine of constructive notice to cases where the change in an article mortgaged, made with the consent of the mortgagee, will fail to put a purchaser upon inquiry as to a claim held by him on the property. Thus a mortgage of clay in the bank would not be notice to a purchaser of brick manufactured from such clay; nor of wool growing upon sheep, of a lien upon the cloth manufactured therefrom. If the cases supposed differ from that under consideration, it is only in degree. In the case at bar, a large amount of additional labor was required to husk and gather the corn and prepare it for market.

If the mortgage lien continues as notice to third parties after such change in the condition of the crop, why may not the mortgagee follow the grain to Chicago, New York, or, in case of its shipment to England or France, to the ports of either country? No one will contend for such a rule; yet if the first purchaser is chargeable with notice of a secret lien, why is not the second, third, or more remote purchaser? The more salutary rule, no doubt, is to require the mortgagee to look after his security, and if a change is made in its character, to see that his mortgage still imparts notice of his lien on the property, to third parties. If the owner of goods stand by and knowingly permit them to be sold as the property of another, he will be estopped from afterward asserting title thereto; and this rule would seem applicable to mortgages of personal property.

There is another reason why the plaintiff cannot recover in this case. There is no proof whatever that the mortgaged property in his possession is not ample to secure his claim, and on the evidence before us he is entitled to recover nothing; but no objection is made on that ground.

The grain in question was purchased in the open market. The mortgagor held an interest in the grain itself, and

there being no sufficient constructive notice to third parties, could pass a good title by the sale. The defendants, therefore, were not liable, and the instruction is not erroneous. The judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

WILLIAM S. WISE, PLAINTIFF IN ERROR, v. JOSEPH
NEWATNEY, DEFENDANT IN ERROR.

[FILED MAY 2, 1889.]

1. **Estoppel: PRINCIPAL AND AGENT: EVIDENCE.** Where the whole tenor and purport of the testimony of three witnesses on the part of the defendant was to the effect and tended to prove that at the commencement and during the entire progress of the negotiations for the sale of the land, involved in the suit of P. L. W., who held the same by tax title, to the defendant, the plaintiff who afterward bought in the general title thereof and by this suit seeks to oust the defendant from the same, which he holds by deed from P. L. W., given pursuant to a sale made upon such negotiation, acted for and in concert with P. L. W., either as his agent or as joint owner with him of said land, and made certain statements to defendant as to the title of P. L. W. to the land, *held*, no error on the part of the trial court to instruct the jury in the following language: "Sixth. If you believe from the evidence that the plaintiff as the agent of his father (the said P. L. W.) or part owner of the premises in question, made certain statements, whether true or false, to the defendant, and whereby he induced him to purchase the premises in good faith and for a valuable consideration, and that the said defendant acted upon them, believing them to be true, the plaintiff is now precluded from asserting the contrary, and you must find for the defendant; for it is a rule of law that where one by his words or conduct willfully causes another to believe in a certain state of things and induces him to act on that belief so as to alter his own previous condition, the former is concluded from averring against the latter a different state of things."

2. **Evidence: HEARSAY EVIDENCE.** Where a witness was called upon to testify as to words spoken to him in a language which he did not understand, and which were interpreted to him into his own language by an interpreter known to him, and in whom he confided, (in the presence of the speaker,) such testimony, *held*, unobjectionable as hearsay evidence. See *Fabrigas v. Moslyn*, 20 S. T. 122, 123; S. C., 2 Wm. Bl. 929.
3. **Error without Prejudice.** One of the principal issues presented was that arising upon the allegation of the defendant in his answer that the plaintiff, as the agent of his father, P. L. W., in order to induce defendant to purchase said land, assured him that at the expiration of four years from the date of the conveyance thereof, he, the defendant, would have an absolute title in fee simple; and there being evidence tending to prove that the plaintiff made such an assurance to the defendant before and at the time of the conveyance of the land by P. L. W. to the defendant, also that before and at the time of the making of such assurance the plaintiff was the general legal adviser of the defendant, *held*, that an instruction which, to the substance and general purport of the one quoted in the first clause of this syllabus, added words to the effect that if the jury should find that the defendant, in the purchase of said land, acted upon the said statements and representations of the plaintiff, "believing what plaintiff said and represented to him, the defendant, was true, and relied upon and acted upon said representations of plaintiff as their legal adviser, then you are instructed that the plaintiff cannot recover in this action," if error, which is not decided, was error without prejudice to the plaintiff.
4. **Evidence: TAX DEED: TAX RECEIPTS.** Where the defendant prayed as alternative relief that he might be subrogated to the rights of his grantor, who held the land in controversy under a tax title, to a return of the money paid by him for such tax title, as well as for a return of taxes subsequently paid by defendant on said land in case of the failure of said tax title, *held*, that the admission of the informal and void tax deed under which defendant's grantor claimed to hold said land, and of the receipts for subsequent taxes paid by defendant on the land, for the purpose of establishing the amount of an alternative recovery therefor, was no error.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

Covell & Polk, for plaintiff in error, cited: *Haller v. Blaco*, 10 Neb. 38; *Howard v. Lamaster*, 11 Id. 584; *Thompson v. Merriam*, 15 Id. 499; *Baldwin v. Merriam*, 16 Id. 199; *Sullivan v. Merriam*, 16 Id. 161; *Morton v. Green*, 2 Id. 451; *Franklin v. Kelley*, 2 Id. 112; *Butler v. Davis*, 5 Id. 521, 525; *Dale v. Hunneman*, 12 Id. 221, 224; *Blazier v. Johnson*, 11 Id. 406.

B. S. Ramsey, and *Mathew Gering*, for defendant in error, cited: *Morton v. Green*, 2 Neb. 451; *Pettit v. Black*, 13 Id. 142; *Rex v. Inhabitants*, 4 T. R. 258; *Armstrong v. Lear*, 12 Wheaton, 175, 176; *Doe v. Stennett*, 2 Esp. N. P. R. 717; *Doe v. Somerville*, 6 B. & C. 126; *Phillips v. Covert*, 7 Johns. 4; *Chamberlain v. Donahue*, 41 Vt. 306; *Galling v. Lane et al.*, 17 Neb. 77; *McKeighan v. Hopkins*, 14 Id. 364; *Roy v. McPherson*, 11 Id. 197; *Gillespie v. Sawyer*, 15 Id. 536; 2 Herman on Estoppel, 862, sec. 731.

COBB, J.

William S. Wise brought his action, in the nature of ejectment, in the Cass county district court against Joseph Newatney, for the title and possession of lots sixty-seven and sixty-eight in the east half of the southwest quarter of section twelve, in township twelve east; two small lots of land containing somewhat less than fifteen acres in the aggregate. The plaintiff, by his petition, alleged title, and the right of possession of said real property in himself, and the wrongful possession and the enjoyment of the rents and profits thereof by the defendant. The defendant, by his amended answer, denied each and every allegation of said petition, alleged and set out several purchases of said lots by one P. L. Wise at sales thereof by the county treasurer for delinquent taxes, the execution of several deeds therefor upon such sales by the said county treasurer to said P. L. Wise, and the due recording of such deeds, the tak-

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ing of the possession of said land by the said P. L. Wise, under and by virtue of the said deeds, and the holding of such possession thereof by him until the conveyance by him thereof to defendant's grantor, thereafter set forth; that on or about the 31st day of August, 1882, and prior thereto, the plaintiff was the agent of said P. L. Wise and wife, who are the parents of said plaintiff, and that as such agent and representative of said P. L. Wise and wife, did make certain representations to defendant, who, upon the date last aforesaid, and for some time prior thereto, was negotiating for the premises described in plaintiff's petition; that on or about the date last aforesaid, said plaintiff, in order to induce defendant to purchase said lands, assured him that at the expiration of four years from the date of said conveyance, he (the said defendant) would have an absolute title in fee simple, and then and there concealed the facts that a defect existed in the title to said lands, and that the said plaintiff intended afterwards to purchase the general title to said lands; that said plaintiff, acting as the agent of said P. L. Wise, as well as for himself, made the above fraudulent representations of said facts with full and complete knowledge of the condition of the title of said real estate, and that he failed to disclose said material facts with full knowledge of the condition of the title of said real estate; and that he failed to disclose such material facts; that such misrepresentations and concealments were made and withheld by said plaintiff with intent to induce defendant to act thereon, and defendant, being entirely ignorant of the condition of said title and other material facts, and relying upon the statements and representations of the said plaintiff, did so act thereon, and that for a valuable consideration, to wit, one hundred and fifty dollars, the said P. L. Wise, at the request and instigation of plaintiff, transferred said lands by quitclaim deed to one Melinda Newatney, which said deed was duly recorded, etc.; that on or about the 24th day of March, 1884, said Melinda

Newatney, who is the daughter of defendant, and to whom the misrepresentations and concealments of material facts as thereinbefore set forth, were also made, deeded said premises to the defendant, who was the real purchaser of said premises from said P. L. Wise and wife, and which fact was well known to the plaintiff.

Defendant further alleged that, by himself and his grantors, he had been in the open, notorious, exclusive, adverse possession of said premises for more than ten years prior to the commencement of said action; that valuable, permanent improvements had been made thereon; that the improvements made thereon by defendant are reasonably worth two hundred and fifty dollars; that defendant has paid the taxes on said land for the years from 1882 to 1886, both inclusive, amounting to twenty-five dollars and fifteen cents; that the cause of action of the said plaintiff did not accrue within three years next before the commencement of said action, etc.; with prayer that defendant's title to said premises may be quieted and decreed in him, and that if defendant's title to said land should be found to be invalid, defendant prays that the amount so paid by him, including the consideration for the purchase of the same, and the taxes paid thereon subsequent to said purchase, and the value of the improvements thereon, with interest, etc., be adjudged to be a lien upon said premises; and for general relief.

The plaintiff filed a reply which amounts to a general denial.

There was a trial to a jury with a verdict and judgment for the defendant. The plaintiff brings the cause to this court by petition in error. The following are the errors assigned:

I. The court erred in giving the paragraph of instructions numbered sixth of the instructions asked for by defendant, and given on his behalf.

II. The court erred in giving paragraph numbered second of the instructions given by the court on its own motion.

III. The court erred in giving paragraph numbered third of the instructions given by the court on its own motion, from the word "unless" therein.

IV. The court erred in admitting in evidence the testimony of defendant Newatney as to conversations had with P. L. Wise and W. S. Wise, concerning the tax title that was purchased by defendant of P. L. Wise and deeded by P. L. Wise to defendant's daughter, as it was all hearsay.

V. The court erred in admitting in evidence the tax receipts marked "exhibits S, T, U, V, & W."

VI. The court erred in admitting in evidence the testimony of Melinda Newatney as to communications had with P. L. Wise and W. S. Wise, respecting the purchase of the tax title made in her name from P. L. Wise.

VII. The court erred in admitting in evidence the records of tax deeds from "Book V" of deeds, etc.

VIII. The court erred in refusing to set aside the verdict.

On the trial, as appears by the bill of exceptions, plaintiff introduced in evidence a certified copy of a patent to one Wheatley Mickelwait, together with *mesne* conveyances, copies of *mesne* conveyances, and of proceedings of court in a certain proceeding in partition, constituting, as is believed, a chain of title to the plaintiff in the lands in controversy. The defendant testified in his own behalf through an interpreter, in answer to the question put by his counsel:

Q. Just give the conversation you had with W. S. Wise there at that time."

The interpreter translating for the witness said: "The first time he said he had \$300 in money, and he was thinking about putting the money in the bank. Newatney said he had \$300, and that Mr. Wise was a good friend of his, and so, he said, he fixed the money so he could put it in the bank, or in some good place, and Mr. Wise gave him the advice that 'I have land next to you there, and it would be pretty handy to you there, and you had better buy the land of me there.'

The same day he says Mr. Wise came up there in the afternoon and told him to go with him and he would show him the land. He said, he come over there, both of them, Mr. Wise's son and his father, and he told him he had better buy the land and he would not lose anything by it. If he put the money in the bank, he said, lots of places they rob the bank, and he may lose the money in the bank; he told him one thing, how they killed one banker in another place, and a woman, and stole the money. That is the way Mr. Wise told him." In answer to the question, "Did Mr. Wise, or didn't he, tell you anything about the title of this property," he answered as reported by the interpreter: "Mr. Newatney told him that he was afraid they may have some trouble with the land; and Mr. Wise said he needn't be afraid at all, that he only need pay two years' taxes on the land and then the land was his own and his heirs', and it would be just as good as if he paid eight years' taxes on it." I further copy the bill of exceptions:

Q. Did Mr. Wise ever say anything to you about the title that he had?

A. He told me that I didn't need to be afraid at all about the title on it; that I needn't be troubled about it at all; and he told me to put the land in his (my) daughter's name, so he couldn't lose anything by it; she was old enough by that time, and so when she be old enough he would give her a clear title to it after two years.

Q. Ask him whether Mr. W. S. Wise said anything to him about the length of time he had been in the possession of that property.

A. Mr. Wise owned the property for eight years, that is, that Wise told him eight years before he spoke to him anything about the land, and he said if Mr. Newatney paid the taxes on the land for two years, then he would give him a clear title to it.

Q. Did you rely upon these representations; did you believe Mr. Wise? * * *

A. Yes, sir, I believed him.

Q. Did you act upon these representations, did you pay over the money? * * *

A. I paid him the money.

Q. Did you act upon these representations; did you believe these statements? * * *

A. Because he was a good friend of mine I believed him all of the time—everything he said to me.

Q. And that is the reason why you paid over this money for this land?

A. Yes, sir, that was the reason I paid him the money.

Q. How much money did you pay him?

A. I gave him \$150 that time.

Q. Who was there when you paid this money?

A. My boy was with me then.

Q. Who else?

A. There was only my boy and both the Wises.

Q. To whom did you pay this money?

A. He gave the money to the young man.

Q. Is that the man there, Wm. S. Wise?

A. Yes, sir.

Q. What did young Wise do with this money?

A. He put it in his safe.

Q. This was at whose office?

A. It was at the same place where Mr. Mercer has his office now.

Q. It was at young Mr. Wise's office?

A. Yes, sir.

Q. How long was Wm. S. Wise trying to get you to buy this land?

A. The third day I bought the land.

Q. It was talked about three days?

A. Yes, sir.

Q. About what day of the month or year did the conversation take place?

A. I don't remember exactly when it was. It was about

five years ago and on Saturday; I don't know what Saturday it was. * * *

Q. Did Wm. S. Wise ever come out there with his father?

A. He came out there Thursday afternoon.

Q. With this young man?

A. Yes, sir.

Q. And did they have this talk; that is, did Wise make this same representation to you there in the presence of his father that he made to you down in the office?

A. He was talking the same. He gave him the same representations.

Q. Both of these gentlemen talked the same way to him at that time?

A. Yes, sir.

Q. What did they say to you concerning the length of time that the Wises had been in possession at this time?

A. He said when they came out there they told him if he would take land he can put the land in his daughter's name, and that is the way he would be safe; and if he paid for two years' taxes, after two years he could come down to him and he would give him a clear title on it without any trouble.

Q. Who said that?

A. He said both of them.

Defendant further testified, through the interpreter, in reply to questions by his counsel, that he did not remember exactly on what day he took possession of the land; that he considered the land his when he gave them the money and he settled up; that then he commenced grubbing and clearing up the land, and he told his friends about it; that that was right away after the above conversation; that he commenced work upon it, and fenced it the first thing, right away after that Saturday; he hired two men and built a fence around it; that he was not right sure as to the time, but that it was about five years ago, or in 1882;

that since that time he had used the land as a pasture, and had been cutting out the brush, so the grass could grow and he could have the use of it; that he had worked there every year since that time; that he put a three-wire fence around it with hickory and different kinds of posts; that he used three bunches of wire in constructing the fence, for which he paid \$49; that he burned the brush that was there and fixed it up so that the grass could grow and he could use the place for a pasture; that the work he did there was worth about \$15 yearly, and for five years was worth about \$75. Defendant here offered receipts for the payment of taxes from 1882 to 1886, which, over exceptions of the plaintiff, were received in evidence. Defendant further testified that he knew that Mr. Wise had the land for eight years; that he did not know who occupied the land, but that he knew that Mr. William S. Wise owned the land.

On reëxamination, he testified, in answer to a question by his counsel, that when he speaks to a gentleman who speaks the English language only, he has to have some one interpret the language for him.

Melinda Newatney, a witness for the defendant, testified that she was the daughter of the defendant. In reply to the question whether she knew anything about the land in controversy here, said: Yes, sir; that she was there from the very beginning; that she heard what was said; that she had to talk everything that was said to her father; that she was acting as interpreter; that the first time that they went to Mr. Wise was when her father had \$300 and wanted to put it in a bank; and they always went to Mr. Wise as their best adviser in such kind of matters; that they didn't know what to do with the money and went to him and asked him what to do with it, whether father could put it in a bank, and he would like Mr. Wise to tell him how to go to the bank and put it in, as father didn't know; and Mr. Wise said it was dangerous to put money in a bank;

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that was Mr. Wise senior's advice; it was often robbed in a bank; that banks broke and he would not get his money. He said the best thing he could do with it was to put it in land; that he had a nice piece of land adjoining the property of father, and he had better invest the money in that, and there it would be safe. This was the old man Wise, in Mr. Wise junior's office. The witness continued: "I don't know just now whether both were there, but I know that Mr. Wise senior had the talk about the bank, and said he would see us in the afternoon about it, and in the afternoon of the same day Mr. Wise senior came out there and showed us where the property was that he wanted us to purchase, and told us all about it, and that he had had possession of the property eight years, and in two years more he could get a good title; he told us he had a great many acres there, and there was eleven in the same piece adjoining it, and if we would take the fifteen he had to have two years more before he could give a good title to it. He talked to father and told us how to get a good title for it after the two years was up—that we should go to Mr. Wise junior and get the deed. Mr. Wise senior said then that Mr. Wise junior would get the land, and he said that Mr. Wise was a very smart man. We always knew him, I thought, until lately, and we always went to him until lately, when he advised us. At the time he talked to us to invest, he showed us where the property was, and father told him he was afraid to take any such property—that a man might lose his money; he said if the owner came back in this time that his work would be paid for, and his money, with interest, and that the taxes would be paid back, and he wouldn't lose anything; that he would make the interest, which would be as much as if the money had been in the bank."

Q. Did you have any talk with young Mr. Wise?

A. He told us the same story over that his father had told us.

Q. What was it he told you?

A. That they had had possession of the land eight years, and that in two more years father would get a good claim, and that he would get a good deed as on the rest of our land; that it would be a good claim, just the same as a good deed, and that we would get that when the two years was up.

Q. What, if anything, did he say about his title to the land?

A. He said he had been paying taxes on it eight years, and in two years more it would be his own.

Q. Did he say he was in possession?

A. He said he had had it for eight years.

Q. In what way did he say he would perfect your title for you?

A. He said that we should go to him, and he would get it for us.

Q. Did he say how he was going to get it?

A. He said he had to go to law to get it, but that he would do all the business for us.

Q. Who was out there with Mr. P. L. Wise; was there anybody out there with him at any time?

A. In the morning when we were there Mr. P. L. Wise was in the office alone, and in the afternoon of the same day; they both came out there, but I can't tell whether—I am not sure they were both there, and father and mother and brother said they were both out there. I know I remember just as well as it was yesterday that Mr. Wise senior was there, and I know on the next day, Sunday morning, they both came out there; they measured the land; that is, on Sunday morning they both came up there and measured the land for us.

Q. What did they say about the ownership of the land?

A. They said they had had it in possession eight years.

Q. And would give you a good title?

A. Yes, sir; in two years more.

Q. Did William Wise say that?

A. Yes, sir.

Q. Tell us how long before you got the deed?

A. We got the deed on Saturday, and this was on Sunday, the next day.

Q. You got the deed before that?

A. Yes, sir; before they measured the land.

Q. Did you see the two Wises together before you got the deed?

A. Yes, sir; I am most positive they were both there on Thursday afternoon; and we seen them both in their office.

Q. Did you believe their statements?

A. Why, certainly we did.

Q. Did you act upon and rely upon the statements that Mr. W. S. Wise made you there in the presence of his father?

A. Yes, sir.

Q. When next did you see William S. Wise, and when did you have another conversation with him? After the time of the transfer of the property did you ever have any more talk with him?

A. We had talked with him quite often about it; we went there when the two years were up and wanted a good deed, and instead of that we got the same deed signed over, and father wanted the deed to him, and he got the same deed signed to him instead of in my name.

Q. What did you say to him at that time about the title he had promised you two years before?

A. I was not there only while the deed was signed, and my brother talked for my father, and they wanted me to go up there and sign my name to the deed, and so I willingly gave the property back to my father; I didn't want to, but I thought to save trouble I would do it. And Mr. Wise told me at the same time I would be just as well off without the property as with it, and I gave him back the property.

Q. Who advised the taking the deed in your name, if anybody?

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A. Father was the first one that spoke; he wondered why it couldn't be that way, and Mr. Wise said it would do just as well if it was in my name. Of course, he said, nobody could take it away from me until I was twenty-one years old; but mother objected; but father didn't care, so Mr. Wise signed it to my name; and I helped coax father to have it signed to my name.

Q. Would you have purchased it at all if those representations had not been made to you by Mr. W. S. Wise?

A. No, sir; we wouldn't.

Q. Was you ever present when any money was passed?

A. Yes, sir.

Q. Who was present at the time when the money was paid over?

A. Mr. Wise senior and Mr. Wise junior, and my father and my brother and myself.

Q. Who paid the money?

A. My father.

Q. Who took the money?

A. Mr. Wise junior, and put it in his safe.

Q. How much was it?

A. One hundred and fifty dollars.

Q. He then gave you the deed, did he?

A. Yes, sir; and the next day came and gave us five dollars back, and said it was only fourteen and a half acres.

The witness was here shown a deed, and was asked if that was the deed signed by W. S. Wise as witness. It was thereupon admitted by counsel for the plaintiff that it was the deed.

A. This is the first deed that was given to me; that is the deed that was first given to me when we first bought the property.

Q. Did you see Mr. Wise in 1887 at any place?

A. I saw Mr. Wise and asked him if he would be at his office, that I would like to talk the matter over before

it went into court, and he said he would be there in the afternoon; and I went, and he was not there.

Q. Was Mr. Wise ever at your house just before he commenced this action?

A. Yes, sir, twice, but I was not there at the time.

Q. Do you know what time your father took possession of this land; what time he commenced making improvements, if any?

A. He commenced right after; he wanted to use it for pasture. He commenced that fall, and let his cows run in there the first part of September.

Q. Do you know what improvements he put upon that land, if any?

A. He commenced gradually; he and my brother cut the brush out first, and burned it up, and then commenced fencing it in gradually; first a piece and then another, until they had it all fenced, and then cut down all the brush every year, so the grass would grow and the cows would run through there. He commenced every year, about spring, and cleared it all away, and cleaned it up. We use it now as pasture land; he digs up stumps at times when he has nothing else to do. Before we bought it there was big trees, and the winter before they were cut down into cord-wood and hauled to town by Mr. Miller. I saw Mr. Wise junior there measuring wood, and saw him measuring the same wood after he brought it to town. We bought the land in August, and the preceding December they cut the wood and hauled it to town, as I recollect.

Frank Newatney, a witness for defendant, testified that he is a son of defendant; that he has known Mr. Wise, the plaintiff, six or seven years; that he knows the premises in dispute between the parties to this suit, and that he knows of the sale of the land by Mr. Wise to his father.

He further testified that "We had some money, about \$300, and were afraid to keep it at home lest the house might burn down or be robbed, and would like to put it in

a bank, so it would not be lost, and went to Mr. Wise; he was a lawyer, and we thought he could tell us how to put it in a bank so it would not get lost; he said it would be better to put the money into land; that he had some land that he wanted father to buy; this was Mr. Wm. Wise, and just then there was a man came into his office, and he said he would see us later, and in the afternoon P. L. Wise came over and showed us the land, and told us about it; that he had possession for eight years, and that in two years more we could get a deed; and we asked him why he didn't keep it. He said he had got so much on hand, but said it was a good piece of land, and in two years we would get a good deed; but we were afraid of trouble. He said it would be no trouble; he said he would stand for the land; he said if before the two years passed the owner comes, that we would get our money back, and the interest, and pay for our improvements; and still we were not very much stuck on land. [The plaintiff moved to strike out all that P. L. Wise said when Will S. Wise was not present. Sustained.] And we still didn't want it, and they said they would come over and see us later; and they came over the next morning, both of them, and they told us the same thing they told us the first day; they said there was fifteen acres of land, and they had had possession of it eight years, and paid taxes on it eight years; if we paid taxes on it two years it would make ten years, and he would give us a good title, as good as a deed; and they kept coaxing us and wanted us to take it, and we took their words for it."

Q. Who were present when they made this statement?

A. Both of them.

Q. Who else?

A. Me, and my sister, and my father; I don't know whether my mother was by.

Q. Where did you say this conversation took place?

A. Over in our place, on our premises there.

Q. Then Mr. P. L. Wise, and W. S. Wise, and your father, and mother, and sister, were all present?

A. I am sure three of us were, I don't know whether my mother was or not; it was close to the house.

Q. Was that before the deed was made?

A. It was.

Q. Was you present when the deed was made?

A. I was.

Q. Where was it made?

A. At Mr. Will Wise's office.

Q. Who was present then?

A. Me, and my sister, and my father.

Q. Was there anything said by Mr. Will Wise or P. L. Wise as to how long they had had possession of the land?

A. They kept saying they had had it eight years; and we thought they were very sound and honest people.

Q. Did you see the money paid over?

A. I did.

Q. Who paid the money over?

A. My father.

Q. To whom?

A. He laid it on the table, and Mr. Will Wise took it and put it in his safe.

Q. Has it been your custom to interpret for your father?

A. We were both there; I talked for him as much as my sister.

Q. You always talked for your father a good deal of the time?

A. I talk for him a good deal, because my sister is not at home all of the time; but at that time she was at home.

Q. During the time your father had conversation with P. L. Wise and W. S. Wise, you talked for him, did you not?

A. I talked for him part of the time, and my sister part of the time. * * *

Q. Did you see W. S. Wise just before this suit was commenced?

A. Yes, sir.

Q. Did your father, and you, and W. S. Wise, have any conversation ?

A. Yes, sir.

Q. What did he say about the land ?

A. He told me there was people running around after that land ; that the town was booming ; that somebody might buy it and pay my father back the interest ; and I said how could they pay the interest, because he said it would be ours in two years ; I told him that, and he told me not to be so smart ; and I never talked to him any more, because if he did not want to talk to me I did not want to talk to him. This conversation took place at his office.

Q. He had sent for you to come to his office ?

A. That is what I heard. I heard that from two of them.

Q. Who told you ?

A. My mother, and there was a man there that Sunday ; they told me that Mr. Wise wanted me to come to his office.

Q. Did Mr. Wise say anything about this land — make you any offer before commencing this suit ?

A. My father was not there when he made that offer.

Q. What did he say to you ?

A. He said that he bought the land of the owner and wanted to pay my father up.

Q. Pay up what ?

A. Pay up his interest in it.

Q. Wanted to pay your father's interest in the land ?

A. He wanted to pay my father up. He didn't say he wanted to buy his interest.

Q. What did you say ?

A. I told him we wouldn't take the paying up of the interest ; it would have to be through more hands than his hands.

Q. State what Mr. Wise said he wanted your father to give him for the land, either in this conversation or any other one? What was the proposition? What did Mr. Wise say he would take for the land?

A. He told me what we would give for the land to the owner. He asked me what the land was worth in the spring when the town was booming up, and my father said if it kept on booming it would be worth about \$100 per acre.

Q. What did Mr. Wise say he would give your father?

A. He never said what he would give; he just said he would pay my father up.

Q. What did he want your father to give him? How much money did he say he would take from your father?

A. He never said how much money he would take from my father.

Q. In that conversation with Mr. Wise in which he said he would pay your father back, did you find out what he would take? Did he say what he would take from your father?

A. He did not.

Q. Did your father build any fence around his property?

A. Yes, sir; there is a fence there yet.

Q. Did you help him?

A. Yes, sir.

Q. What else did he do to improve the property?

A. He cleared the brush off as much as he could, when he had time, and kept care of it right along as if it was his own, because it was sold to him and told to him that it would be his own.

Q. You took possession of it, did you not?

A. Yes, sir, and took care of it just as if it was our own.

Q. State for what purpose you used it?

A. We used it for a pasture. It was right by the land we had used as a pasture.

Q. What kind of a fence was this ?

A. A barbed-wire fence.

H. M. Miller, a witness for the defendant, testified that he had been a resident of the county and state for about eighteen years, and knew the plaintiff in this action. His examination was as follows :

Q. State whether you ever had any conversation with Will. S. Wise as to the property in this case and your going upon the property to cut the wood ?

A. Yes, sir, I did.

Q. You were employed by William S. Wise, were you not ?

A. Yes, sir.

Q. When was this ?

A. I have most forgotten when it was, it was so long ago. I believe in 1880 or 1881 ; I think it was.

Q. While you were at work on that land, cutting timber, did Mr. W. S. Wise come out there at any time ?

A. Yes, sir. If he hadn't I would have quit work.

Q. He came out there frequently, did he ?

A. Yes, sir, once in a while.

Q. Did his father come out there also ?

A. I wouldn't say positively about that, but I think he was out there.

Q. Were you under his direction when you were working on this land, or were you not ?

A. I was.

Q. What did you do on the land ?

A. I cut the timber off and hauled it to town.

Q. What did you do with the wood then at that time ?

A. I put it right where he told me to put it.

Q. Where who told you to put it ?

A. W. S. Wise.

Q. He told you where to put this wood ?

A. They both told me to do that—P. L. Wise and W. S. Wise. That was on the branch of the creek up where Jerry Farthing had his brick kiln.

Q. Did you ever have any conversation with W. S. Wise about that land?

A. They told me they bought it for taxes and they had a right to take the timber.

Q. In conversation with father and son did they ever speak of it as our land?

A. They claimed to own it together; that is the way I understood it.

The defendant introduced a deed from P. L. Wise and Francis S. Wise to Malinda Newatney, in which this same land, lots sixty-seven and sixty-eight in section twelve, township twelve, range thirteen, Cass county, is described. The plaintiff objects because there is no foundation laid for the introduction of the deed and because it does not tend to show color of title in P. L. Wise. Objection overruled and exception taken, No. X. It is admitted that P. L. Wise executed the deed marked Ex. X.

The defendant also introduced the deed from Malinda Newatney to Joseph Newatney for the same property.

The witness J. M. Robinson, county clerk of Cass county, recalled, and having produced county Record V of deeds, turned to page 332, which, with page 333 and so much of 334 as relates to the property in question, purporting to be a tax deed by the treasurer of Cass county, conveying to P. L. Wise lots 67 and 68, the property in question. The plaintiff objects because there is no treasurer's seal attached to the deed, and because the deed does not show the place where the land was sold, and does not tend to show color of title. This objection was overruled and the record admitted in evidence.

The witness turned to page 335 of the same record. The defendant offered that deed and so much of the record on pages 335, 336, and 337, of the description of this property, as purports to be the deed from J. C. Cummings, treasurer of this county, to P. L. Wise. The plaintiff objects because it does not show the place where the land was

sold, and is without the seal of the county treasurer thereto, and is incompetent and irrelevant, and does not tend to show color of title. The objections were overruled and both deeds offered by defendant to show color of title. The plaintiff's objection to the deeds as tending to show color of title was sustained and exception taken.

David Campbell, a witness for the defendant, testified that he is treasurer of Cass county, and as such is authorized to collect the taxes of the county, and has in his possession the record of taxes collected on lots sixty-seven and sixty-eight in section twelve, township twelve, range thirteen, and by whom paid. The defendant thereupon offered in evidence the tax lists for the years 1874 to 1882, inclusive, showing that P. L. Wise had possession of said property and paid the taxes for the years mentioned. The plaintiff objected to the evidence as incompetent, immaterial, and irrelevant, which was sustained.

The plaintiff P. L. Wise, and Frank Knowlek, were sworn and examined as witnesses for the plaintiff in rebuttal. They contradicted nearly or quite all the testimony of the Newatneys in regard to the representations by the Wises or either of them, before, at the time, or subsequent to, the execution of the deed from P. L. Wise to Malinda Newatney. That of the witness Frank Knowlek tended to contradict some of the statements of defendant's witnesses as to the extent of improvements made upon the land in question.

I will examine such of the errors assigned by plaintiff as are discussed in the brief, in the order therein presented. Plaintiff first complains of the giving by the court of the sixth paragraph of the instructions, given as asked by defendant, as follows:

"6th. If you believe from the evidence in this case that this plaintiff, as the agent of his father, or part owner of the premises in question, made certain statements, whether true or false, to this defendant, Joseph Newatney, and

whereby he induced him to purchase the premises in good faith and for a valuable consideration, and that the said Newatney acted upon them believing them to be true, the plaintiff is now precluded from asserting the contrary, and you must find for the defendant; for it is a rule of law that where one by his words or conduct willfully causes another to believe in a certain state of things, and induces him to act on that belief so as to alter his own previous condition, the former is concluded from averring against the latter a different state of things."

The chief objection to this instruction urged by plaintiff is that it is not applicable to the evidence given in the case, and plaintiff urges that the instruction misled the jury by assuming that the testimony *showed* that the plaintiff was the agent of his father, P. L. Wise, or a part owner of the premises, and so forth. Also that it further misled the jury that the testimony *showed* that he had willfully made certain statements to the defendant whether true or false, and so forth.

I do not understand this objection of the plaintiff to be well founded. The instruction does not assume that the testimony *showed* anything. The most that may be said is that it assumed that there was evidence before the jury tending to prove the facts alleged; and so far as this assumption may be imputed to it, I think that the evidence is equal to the assumption. It is true that no witness testified as a fact that the plaintiff was the agent of P. L. Wise, and probably, that no one testified in so many words that the plaintiff was part owner of the property at the time of such sale by his father to Newatney. But the whole tenor and purport of the testimony of the Newatneys, father, son, and daughter, was to the effect that during most or all of the negotiations which led up to the execution and delivery of the deed and the receipt of the money therefor, W. S. Wise acted for and in concert with P. L. Wise, the grantor in the deed, and I think it was the province of the jury to find from

these facts whether or not the plaintiff in these transactions acted as the agent of his father, P. L. Wise. It is equally certain that the testimony of each of the Newatneys tends to prove that the plaintiff made statements to the defendant before and at the time of the purchase of the land whereby he was induced to make such purchase.

The instruction does not decide whether these statements were true or false, but tells the jury, in effect, that whether true or false, the plaintiff was estopped to deny them after defendants had acted thereon. But the plaintiff contends as to the testimony of the defendant that it was all hearsay; he, not understanding the English language, could not be permitted to state what the plaintiff said to him, or in his presence through an interpreter. This might present a question of importance did the matter depend entirely upon the testimony of the defendant. But leaving his testimony out of view, that of Malinda and Frank Newatney was to the same effect first and principally as that of the defendant.

As to the question of hearsay evidence, we are cited to no authority in support of the exclusion of the testimony, and have found, in the limited research given it, but one, in that of *Fabrigas v. Mostyn*, 20 S. T. 122, 123. This was an action brought by the plaintiff against the governor of Minorca for false imprisonment and banishment. It appears from the report that the imprisonment of the plaintiff by the government was sought to be sustained upon the ground that the plaintiff was guilty of mutiny and sedition. It further appears that the facts upon which the charge was sought to be fastened, were his seeking to bring an action against a certain officer of the island, called *the mustas-taph*, for refusing to furnish the prisoner certain facilities for disposing of his wines. It seems to have been deemed important to prove whether the accused sought to bring criminal or civil proceedings against said officer. One James Wright, secretary to the governor, being on the stand as a witness for the defendant, and having testified

that Fabrigas came to him in his official capacity, witness asked him in the governor's name what he meant, whether a civil prosecution to recover damages against Ailimundo, *the mustastaph*, which he had sustained, or whether he meant to make an example of him for any abuse he had committed in office. * * * Whereupon, Sergeant Glynn said: "I would not interrupt this evidence, as it does not appear to be of great consequence to us, but I submit to your lordship whether this is properly evidence, the answer being conveyed through an interpreter? and whether the interpreter should not be produced who knows what answers were given?" Mr. Lee: "We are now to take the answer from a man that does not know what the questions were, in a language the witness does not understand, and consequently cannot report if there were any, or what answers given; whereas there is a man living in the world who could report the answers that were given. I should not object to it, if that gentleman could himself understand the answers that were given." Mr. Justice Gould, before whom the cause was tried, said: "I think it is very clearly sufficient evidence." This ruling is referred to both in Phillip's and Greenleaf's treatises on Evidence, and being the only case cited by either, I do not think that authorities on this point are abundant.

The second point is that the court erred in paragraph second of instructions to the jury by the court on its own motion, as follows:

"If you find from the evidence that the defendant purchased the premises from the plaintiff's father, and that plaintiff negotiated said purchase on behalf of his father, and induced the defendant to purchase said premises, and represented to the defendant that the title he was purchasing from plaintiff's father would ripen into a perfect title within two years from defendant's purchase of the same, based upon the tax title then owned by his (plaintiff's) father, and that defendant purchased the premises in con-

troversy believing what plaintiff said and represented to him, the defendant, about said title, was true, and relied upon and acted upon said representation of plaintiff as their legal adviser, then you are instructed that the plaintiff cannot recover in this action."

Plaintiff in the brief points out the error in this instruction to be that the issue presented by the pleadings was that the plaintiff had stated to defendant, to induce him to purchase the tax title of his father, that his father's title would ripen into a perfect title in two years, and that he did this as their legal adviser, when there was no such issue presented by the pleadings; that the issue presented by the pleadings was that the plaintiff, as the agent of his father, P. L. Wise, in order to induce defendant to purchase said lands, assured him that at the expiration of four years from the date of said conveyance, (the quit-claim deed from P. L. Wise,) he, the aforesaid defendant, would have an absolute title in fee simple.

The doctrine of this instruction, as well as that of the other one, is that if the defendant purchased the land in question from plaintiff's father, and the plaintiff himself negotiated said purchase on behalf of his father, and during such negotiation represented to defendant such a state of things as existed in respect to the said land, if defendant would hold the same after such purchase and pay the taxes thereon for two years thereafter, the right which he purchased from plaintiff's father would ripen into and become an indefeasible title in defendant; and defendant having purchased said land by reason of such representations, and paid the taxes thereon for the full term of two years, then that plaintiff was estopped to deny that the defendant had such title in the land. If that position be a correct one under the law, then it was a true conclusion therefrom that the plaintiff could not recover in the said action, independent of and aside from the fact that plaintiff stood in the relation of legal adviser to the defendant

at the time of the making of such representations and the holding out of inducements to defendant to buy the said land. And the adding of the condition to the instruction by the trial court that in order to estop the plaintiff the jury must believe that he acted as the legal adviser of defendant when he made the representations and held out the inducements upon which he purchased the land, was against the defendant and in favor of the plaintiff. And if it was error, which I do not decide, it was error without prejudice to the plaintiff.

It will be here observed that there appears to be a slight discrepancy between defendant's answer and his proof, in this—that the answer alleges in substance that in order to induce the defendant to purchase said land, the plaintiff represented to him that at the expiration of four years from the date of said conveyance he, the defendant, would have an absolute title in fee simple to the said land; whereas the evidence of some or all the witnesses for defendant was to the effect that plaintiff represented to defendant that plaintiff and his father had been in possession eight years, and that if defendant would continue in such possession and pay the taxes for two years from the date of the deed to Malinda, his title would ripen into a perfect and indefeasible title.

But there is no material discrepancy in the evidence. It tends to prove the substance of the answer and more. By the answer, the plaintiff is alleged to have represented that he had occupied the land and paid the taxes thereon for six-tenths of the time necessary to acquire a title to real estate by adverse possession, whereas the evidence tends to prove that he represented that he had been in such occupancy for eight-tenths of the time required for that purpose. This discrepancy is further rendered immaterial by the fact that more than four years elapsed from the date of the deed to Malinda before the commencement of this suit, or of the controversy which led up to it, and that during the whole of said time defendant remained in possession and paid the taxes on the land.

The third point discussed is that the court erred in the third instruction to the jury given on its own motion, from the word "unless" therein:

"Unless you find that the defendant's equity in said land and the title he purchased and took from plaintiff's father, was obtained by the defendant through the representations offered by plaintiff, and that defendant was induced to invest his means in said real estate and place improvements thereon under the advice and representations of the plaintiff that the tax title he was purchasing would speedily ripen into a complete legal title, for if the defendant did rely upon such representations made by plaintiff, if you find from the evidence that the plaintiff did make such representations, the plaintiff, being the son of the defendant's grantor and an attorney at law, would not be permitted to take advantage of the ignorance of the defendant as to the title he was induced to purchase, or take advantage of advice he had given him, if you find that he did give such advice, to obtain defendant's money and means by prevailing upon him to invest the same in the real estate in controversy, believing he was obtaining a good title to the same, by purchasing the outstanding title to said real estate for himself in order to oust defendant from said real estate and deprive him of the same, for the law will not permit a man to take advantage of his own wrong."

The answer to this argument of counsel must be in part a repetition of what has been said in answer to the first point. The instruction does not assume that the testimony shows the facts as stated above, but it properly assumes that the evidence tends to prove the facts stated in the instruction, which is, as appears to me, a fair *résumé* of the evidence on the part of defendant; that defendant, having confidence in the wisdom and integrity of the plaintiff, and having had the benefit of his legal services and advice on former occasions, went to his office for the purpose of consulting him in a matter of great importance to one of his

situation and fortune—about the depositing of a sum of money in bank. The weight of the testimony is that he failed to find the plaintiff in his office at the time, but found his father there, to whom he communicated the object and purpose of his visit; that he was cautioned against intrusting his money to a bank, but advised to invest it in land, informing him that he had a tract of land handy and contiguous to defendant which he desired to sell him, and thought would suit him. All three of the witnesses agree in substance that either at the time, or on a future occasion, at that place, or on the land itself, the plaintiff joined his father in these representations and efforts to negotiate the sale of said land to the defendant. It cannot be denied that they together explained to defendant the nature of the title held by the senior Wise, and that it was represented to be a title which by the lapse of time and the continued payment of taxes would ripen into an indefeasible title; but that should the owner of the genuine title to the land, whose identity and residence was then unknown to the parties, return and claim the said land before the ripening of the title then in the said P. L. Wise, (but which was sought to be disposed of to the defendant, and which was finally disposed of to him,) into a perfect title, then in that case, through the legal services and ability of the plaintiff, who was an attorney at law, the plaintiff would be enabled to realize all of the money paid for the original purchase, together with interest, all taxes which he should pay thereon, with interest, and compensation for all labor which he should bestow upon the land, before he could be compelled to relinquish the possession. Now if this state of things, which, as above said, the evidence tended to prove, was proved, then it requires no stretch of the doctrine of estoppel to cover the proposition that the plaintiff is estopped to assert a title acquired by himself, after these transactions, to the exclusion and denial of the right of the defendant. This is all that I understand the

instruction of the court, now under consideration, to tell the jury.

The plaintiff also assigns as error, as the fifth point in the petition in error, the admission in evidence of the receipts for taxes paid by defendant on the land in dispute. It will be seen by reference to the answer that the defendant prayed, as alternative relief, that in case his title to the land should be found defective, he be allowed a lien thereon for the amount paid for the purchase money, as well as for the taxes paid, and for improvements. It is assumed without a critical examination of the law, that a person in possession of land by virtue of a tax title, upon such title being adjudged invalid, is entitled to a judgment in his favor for the taxes paid in good faith, with interest. To lay the foundation therefor, it was necessary that he introduce his receipts for taxes paid subsequently to the acquisition of the tax title he offered in evidence. Hence there was no error in the admission by the court of such receipts, as evidence, when offered.

For the same purpose the tax deeds executed to the grantor of defendant, the admission of which is complained of by the *seventh* assignment, were necessary; for while the defendant in that event would probably not be entitled to the full amount paid by him to P. L. Wise on the purchase of said land, he would be entitled to be subrogated to all the rights of his grantor in the land, including a lien for the taxes actually paid by him for which he received these tax deeds, and for interest thereon; and these deeds were the only evidence of the payment of such taxes. They were, therefore, admissible in evidence.

By the *sixth* assignment, the plaintiff complains of the admission in evidence of the testimony of Malinda Newatney as to conversations had with P. L. Wise and W. S. Wise respecting the tax title in her name from the former. This conveyance was made to the daughter Malinda, for the defendant, as was understood at the time by both of

the parties, so that any conversation between the parties at and about the time of making the deed was equally applicable and admissible in evidence as though the deed had been made directly to the defendant himself.

There appearing, therefore, no reversible error in the record, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

ISAAC OBERFELDER AND SIMON OBERFELDER, PLAINTIFFS IN ERROR, V. JULIA DORAN, EXECUTRIX OF BERNARD DORAN, DECEASED, DEFENDANT IN ERROR.

[FILED MARCH 27, 1889.]

Injuries to Person. I. and S. O. were the lessees of a large, double store building in which they carried on a wholesale-millinery business. To this store building was attached and used by I. and S. O., their employes and customers, in ascending to the second, third, and fourth stories of said building, also in descending to and ascending from the basement thereof, and was also used by said I. and S. O. and their employes in carrying goods into and from the different stories of said building, and empty boxes and other litter from the same, a hydraulic passenger and freight elevator. The beams, upon which rested the axles or journals of the main wheel or pulley, over which ran the cable which sustained the traveler or carriage of said elevator, were composed of pine lumber, which at the date of the cause of action hereinafter mentioned, by reason of dry-rot, in connection with the numerous knots therein, had become and were unsuitable, improper, and unfit for such use. B. D., husband and testator of J. D., was in the employment of I. and S. O., either as their servant or casually employed expressman, and as such was lawfully upon the traveler or carriage of said elevator, when, by reason of the weak, knotted, and rotten condition of said beams, they split, broke, and fell, precipitating

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said B. D. to the bottom of the basement of said building, and bringing down upon him the said main wheel or pulley, breaking his legs, and inflicting other injuries upon him, by reason of which he soon afterwards died. A verdict and judgment for the plaintiff sustained.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

Lake & Hamilton, and *A. J. Poppleton*, for plaintiff in error, cited: *Forsyth v. Hooper*, 11 Allen, 422; *Deforest v. Wright*, 2 Mich. 368; *DeGraff v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 131; *Atchison, Topeka & Santa Fé R. Co. v. Wagner*, 7 Pacific Reporter, 204; *City of Lincoln v. Walker*, 18 Neb. 245; *Swords v. Edgar*, 59 N. Y. 35; *Staple v. Spring*, 10 Mass. 72; *House v. Metcalf*, 27 Conn. 631; *Nugent v. Boston*, 12 At. Rep. 797.

J. T. Moriarty, and *J. C. Cowin*, for defendant in error, cited: *Cooley on Torts*, pp. 531 and 532; *Shearman and Redfield on Negligence*, sec. 503; *Bears v. Ambler*, 9 Pa. St. 194; *Leonard v. Storer*, 115 Mass. 86; *Wabash R. R. Co. v. McDaniels*, 107 U. S. 454; *Hough v. R. R. Co.*, 100 Id. 213; *Burke v. Witherbee*, 98 N. Y. 582; *Cooley on Torts*, p. 727.

COBB, J.

This case is brought to this court on error from the district court of Douglas county.

The defendant in error filed her amended petition in the court below against the plaintiffs in error on January 2, 1888, alleging that on March 25, 1887, her husband, Bernard Doran, died, leaving a will appointing her sole executrix thereof, which will was duly proven, admitted to record, and letters testamentary were issued to her thereon; that she is the mother of Emmett N., aged eight years, Patrick J., aged five years, Martha E., aged three years, and

Bernard M., aged two months, children of her said husband deceased, upon whom she and her said children were wholly dependent for support, and in behalf of whom, as heirs at law and next of kin, she brings this suit; that on March 8, 1887, and for a long time prior thereto, the defendants were lessees of a four story brick building, Nos. 1213 and 1215 Harney street, in Omaha, in said county, and had control and management of the same, and of the elevator used and operated therein, in conducting their business of wholesale milliners and dealers in notions; that said elevator was attached to one end of a cable which passed over a large iron wheel, and was operated by machinery with which the other end of the cable was connected; that said wheel weighed about six hundred pounds, and was supported by wooden beams crossing diagonally from one side to the other of the shaft of the elevator, at a distance of about seventy-five feet above the cellar floor of the building; that it was the duty of the defendants to see that said wooden beams were composed of sound material, kept in good repair, and were of sufficient strength for the purpose for which they were used; but that said wooden beams consisted of four weak, decayed, and rotten, pine boards, each of which was filled with from ten to fifteen knots, and all fastened together with nails and bolts; that the defendants carelessly and negligently permitted said beams to get out of repair by becoming decayed, rotten, and weak, and were of inadequate strength and wholly unfit for the purpose for which they were used, of all of which defects the defendants were at all times informed and had full knowledge, but of which the said Bernard Doran had no knowledge whatever; that on the 8th day of March, 1887, said Doran was, and for a long time prior thereto had been, in the employ of said defendants, and while so employed it was his duty to remove store boxes and other material to and from the cellar floor and the several floors of the building, upon and by means of the said elevator. And while the said Doran was so en-

gaged at said work on said day, in the discharge of his duty, the said wooden beams, by reason of their condition and inadequate strength and general unsuitableness to the purpose used, gave way and broke into two pieces each at the point where the axle of the wheel rested upon them, thereby causing the wheel to fall and be precipitated with force and violence down into the cellar-floor of the building, falling upon and striking both legs of said Doran, breaking and crushing the bones, and bruising, tearing, and mangling the flesh thereof, by reason of which it became necessary to amputate both of his legs, one above the knee and the other immediately below it, which was done on said last mentioned day. After receiving said injuries, and incurring expenses for surgical aid and nursing to the amount of \$200 therefor, and experiencing pain and suffering till the 25th day of March, 1887, said Doran died, by reason of said injuries through the carelessness and negligence of said defendants, by reason of which the plaintiff and her said children have sustained damages to the sum of five thousand dollars, for which she prays judgment.

The answer of the defendants admitted the premises so far as the occupation of the building for the purposes alleged by the plaintiff and that "there was an elevator in the building used for lowering and elevating persons, store-boxes, merchandise, and other material to and from the cellar floors thereof," but specially denied any negligence or carelessness charged against them; and further admitted that said Doran received some injury at the time and place alleged, and died, leaving a widow and three children, as alleged, but denied generally all other allegations of the petition.

There was a trial to a jury with a verdict for the plaintiff, and judgment thereon. The defendant's motion for a new trial having been overruled, the cause is brought to this court on the following assignments of error:

I. In refusing to give instructions to the jury numbered 1, 2, and 6, requested by the defendants.

II. In giving instructions numbered 1, 3, 5, and 6, requested by the plaintiff.

III. In holding that the verdict was supported by sufficient evidence.

The instructions offered by defendants and refused by the court are :

"1. The jury are instructed that the defendants had the right to assume that the elevator in question, when they took the lease from Smith and entered upon their occupancy of the premises, had been constructed of sound material and in a workman-like manner; and even if the jury find from the evidence that the injury complained of was caused by the use of decayed or defective timber in the construction of the elevator, of which the defendants had no knowledge until after the injury, they are not liable in this action.

"2. The jury are further instructed that the defendants had the right to infer when they entered upon and during the occupancy of the building in question, that the elevator therein and its supporting timbers were of suitable dimensions, and sound; and the fact that they did not examine the timbers which finally broke to ascertain their condition in these respects, nor call upon a mechanic or expert to do so, is not evidence of neglect or default on their part."

"6. And even although the jury may believe that an extraordinarily prudent or careful person, under the circumstances surrounding the defendants in their leasing and occupying the premises in question, might or would have made, or have had made by a carpenter or expert, an examination of the timbers supporting the elevator, for the purpose of ascertaining their condition and soundness, still, if ordinarily prudent persons under like circumstances would probably have done substantially as the defendants did, then they are not liable, and the jury should find a verdict in their favor."

Those given which are complained of are :

"1. That the relation of master and servant exists whenever one person, under valuable consideration, engages in the service of another and undertakes to observe his directions in some lawful business. The relation is one of contract, and the parties may stipulate for any kind of lawful service on any lawful condition.

"If, therefore, the jury believe from the evidence that the relation of master and servant existed between the defendants and Bernard Doran at the time he received the injuries complained of; that the injuries so received were caused by and through the carelessness and negligence of defendants; that said injuries were received while the said Doran was engaged in the discharge of his duties as the servant of the defendants, without fault or negligence on the part of deceased, and that he died by reason of the injuries so received, then, in that case, you will find for the plaintiff."

"3. That it was the duty of the defendants to use reasonable diligence and care to have the elevator and its several parts in a reasonably safe condition for the purposes for which they were used by authority or directions of defendants, and to keep the same in proper repair, so that the elevator might be used by those entitled thereto with a reasonable degree of safety, with proper care and caution and without fault on the part of those using the same; and the defendants are not relieved from this duty from the fact that they may not have personally possessed the skill to determine whether the machinery was reasonably safe, or in reasonably safe repair."

"5. That if they find that the deceased Bernard Doran was properly using the elevator all the time of the accident, and that he came to his death by reason of the injuries received from the falling of the elevator or any of its parts, without fault on his part, and that the timbers which supported the wheels over which the cable passed that operated the elevator car were palpably and plainly insufficient in

strength, of improper and defective material, and the defendants had knowledge of such insufficiency of the timbers and other defects therein, or such insufficiency and defects had existed for such a length of time that by reasonable care and diligence, commensurate with the nature and use of elevator machinery, they could and would have had and possessed such knowledge, and ascertained the condition, and said timbers broke on account of such insufficiency and defects, causing the fall and injuries aforesaid, then, and in that case, the plaintiff is entitled to recover.

"6. The deceased had a right to assume without examination that said elevator and its several parts were in reasonably good condition and repair, and that it was reasonably safe to use the elevator in its proper employment."

The first point of contention by the plaintiffs in error is that the relation of master and servant did not exist between the deceased and themselves. They do not attack the law as given to the jury by the court in the first instruction, asked by the plaintiffs in error.

While, probably, there was evidence by which the jury could find that the relationship of master and servant existed between the deceased and the plaintiffs in error, under the law as given them by the court, and while I believe that the rule thus laid down is correct, I do not think it was necessary that the jury should pass upon that question in order to reach the conclusion which they did; as I do not conceive that an employer owes a higher obligation to his servant regarding the safety and suitability of the machinery which he is required to operate, or the ways and carriages by which he goes to and from his employment, than is due to other persons not servants or employees, who, upon his invitation, either expressed or implied, may use or be subject to the power and exigencies of his machinery, or may pass over such ways and carriages in pursuance of business, in accordance with invitation.

The next point is briefly stated by counsel as follows:

"In order to have reached the verdict rendered, the jury must have found that the plaintiffs in error were guilty of the negligence charged in the petition. There is not sufficient proof to establish such negligence, and hence the verdict is not sustained by the evidence."

The petition, after describing the elevator and the manner of its fall, further alleges "that the defendants carelessly and negligently permitted said beams to get out of repair by becoming decayed, rotten, and weak, and were of inadequate strength and wholly unfit for the purpose for which they were used." It will thus be seen that while it is not admitted by the petition that the beams of the elevator were originally sound, and fitted for the purpose for which they were intended, yet the allegation is, and the chief negligence charged against the defendants was, that they negligently permitted the elevator and its supporting beams to get out of repair by becoming decayed, and rotten, and insufficient for their purpose.

Freight and passenger elevators and like mechanical contrivances for merchandise, factories, and hotels, are of modern use. Probably less than thirty years ago they were nearly unknown in this country. This is the first instance, under my observation, in which the question of the liability of the owner or tenants of buildings employing an elevator, to any class of persons suffering injury by the use of it, has been mooted.

The lives and safety of guests at hotels, or the customers and employes of a mercantile store, or factory, where an elevator is now in common use, must, in the very nature of things, constantly depend for safety upon the strength of the machinery, its fastenings and support, and the proper condition in which all parts are preserved, as well as upon the skill and fidelity of those intrusted with their management. A great degree of responsibility thus necessarily rests upon the builders and owners of houses in constructing and leasing them with this improvement; but more especially is

the responsibility upon tenants to whose business operations it is made an important accessory.

Many of the cases cited by counsel for plaintiffs in error seem to have been brought forward to establish the liability for injuries similar to that at bar upon the landlord and owner of the premises, and not upon the tenant, lessee, and occupant. These cases, especially that of *Swords v. Edgar*, 59 N. Y. 35; *House v. Metcalf*, 27 Conn. 631; *Nugent v. Boston C. & M. R. Corp.*, 12 Atlantic Reporter, 797; are cases where actions were sustained against persons standing in the relation of landlord, and not of tenant or occupant. But I do not think that the premises and the logic of any one of these cases is such as to relieve the tenant or occupant from responsibility, or to establish the proposition that, had the action been brought against him instead of his landlord, it could not have been maintained.

While it will be admitted that the same legal principles will govern a case brought for an injury caused by negligence in failing to keep in repair an elevator operated in a hotel or store, that would apply to an action for injury for failing to keep in repair an engine or other machinery of railway transportation, or by failing to keep in repair the platform, guards, timbers, and supports, of a public wharf, yet, in so far as there may be a difference necessarily growing out of the nature and use of these several kinds of improvements respectively, I think that the greater burden is thrown upon those responsible for the safe construction, good repair, and careful operating of a passenger elevator. The kind of domestic use to which these improvements are applied, the apparently slight risk which presents itself to those who often risk their lives upon the sufficiency of an elevator, and the care with which it is operated in ascending and descending from one floor to another, are calculated to lull into a sense of security, without apprehension, and prevent inquiry and examination of the guest or customer into the construction, the condition, or the material, of such

machinery. Indeed, it may be said that all persons at hotels, stores, or buildings, using elevators, if they do not "take their lives in their hands," they constantly intrust them to the fidelity and skill of the constructor and attendant of such machinery; and it may be answered that a like risk is involved in regard to our use of all the complex conveniences of life. That such is true, to a considerable extent, is granted, but I know of no important experiment to save bodily labor and fatigue upon which the daily safety of individual life depends, and is so much endangered, as that of the passenger elevator. And so it will be readily admitted that a rule of law would be objectionable which fails to designate the person or persons in every case whose duty it shall be to exercise proper care and bear the responsibility for the construction, preservation, and management, of all passenger elevators to the use of which the public are invited.

While I would not say that where a man who erects a building with an elevator negligently allows it to be unsafely constructed, and afterward lets it to a tenant, and while the same is so occupied, a servant, customer, or guest, or one of the general public, who has been expressly or impliedly invited to its use, is injured, without contributory negligence on his part, by reason of the unskillful construction or improper material of such elevator, an action for damages for such injury would not lie against the constructor or landlord, yet I do hold that, in many, if not in most cases, it would amount to a denial of justice to establish a principle or rule of law that would confine and limit the remedy to an action against the builder or landlord. And I think that in the very nature of things such injured person has a cause of action against the person who controls the premises and profits by the business of which the elevator is a component part and accessory.

In the case at bar, the plaintiff introduced in evidence the contract lease of the premises from George Warren

Smith, the owner, to the defendants, by which it appears that the defendants were by the terms of their lease to keep the premises, and especially the hydraulic elevator and all its connections, machinery, and pipes, in good order and state of repair, and free from all obstruction.

This evidence obviates the necessity of the discussion of the question of the direct primary liability of defendants, in case there be liability upon any one, for an injury sustained by reason of the defective state of repair of the elevator in question. And it appears that the authority of the cases cited by the defendants in error in the brief, and especially that of *Burdick v. Cheadel*, 26 O. St. 395, establishes such liability of the defendants, for damages sustained by reason of the faulty and imperfect original construction of the machinery.

Upon the trial, three pieces of timber were offered and received in evidence, marked Exhibits Nos. 1, 2, and 3, and were examined and considered by the jury in making up their verdict. They were attached to and made a part of the bill of exceptions, were exhibited to the court, and commented upon by counsel in their argument of the case. These pieces of timber were identified on the trial by witnesses O'Donnovan, O'Keef, and Jenkins, (and their evidence was not denied,) as being part of the beams upon which rested the boxes and journals of the wheel upon which ran the cable bearing the weight of the traveler or carriage of the elevator, and its passengers and freight. The evidence of these witnesses tended to prove that the beams were constructed of an improper material, that the timber was unsound by reason of natural knots which increased its liability to split and break, and that whatever may have been the condition of the lumber composing the beams when constructed, it was, at the time of the accident and injury to the deceased, utterly unfit for the purpose for which it was used, by reason of dry-rot and decay.

This evidence was fully corroborated by the examination

of the timbers by the jury as well as by this court. The evidence and the examination tended also to prove that the faulty character of the beams, and their unsafe condition, shortly before the injury, were such that the true condition should have been detected by the inspection of a competent person.

It also tended to prove that such faulty condition of the beams "had existed for such a length of time, that by reasonable care and diligence on the part of defendants, commensurate with the use of the elevator machinery, they could and would have had and possessed such knowledge and ascertained the condition" of said timbers.

The verdict of the jury is therefore sustained by the evidence, and by the fifth instruction as given by the court at the request of plaintiff in the court below.

I cannot agree with counsel in their contention that the defendants were not obliged to make a proper examination and inspection of the timbers of said machinery from time to time, to ascertain whether they were still safe and sufficient to do their work; but, on the contrary, am obliged to insist that it was their duty to make such inspection, whether the defects which led to the injury and loss of life were in the original construction, or whether incidental at a later period.

And, as above stated, there being evidence sufficient for the jury to find that the faulty character of these timbers was such that a proper inspection would have disclosed the same, it appears unnecessary to pass upon the question as to whether their duty to make such inspection would exist only where it is shown that such inspection would have revealed the defects.

No special objection being made in the brief, to the instructions, other than the fifth, as set forth, they will not be further considered than to say that they appear to be in the line of judicial safety, and fairly within that of approved public policy, which must control such semi-public

improvements as that here involved, and that they meet our entire approbation.

In the case of *The City of Lincoln v. Walker*, 18 Neb. 244, cited by counsel for the plaintiffs in error, it was held that, "in an action for negligence, where the plaintiff can prove his case without disclosing any negligence on his part, contributory negligence is a matter of defense, the burden of proving it being on the defendant." Applying this rule of law to the case at bar, I understand it to mean that the plaintiff being able to prove the injury and loss to her testator, by reason of the negligence of defendants, without disclosing any contributory negligence on the part of her testator, she may leave the whole question of contributory negligence to the pleadings and proofs of the defendants, as they shall be advised, and need not enter upon the negative task of disproving any possible negligence on the part of the testator; and as there are neither pleadings nor proof as to his contributory negligence, that question is not presented to be further considered.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

WILLIAM I. FISHER, ORPHA R. NYE, ELIZABETH BENNETT, APPELLEES, V. N. HERRON, SHERIFF, APPELLANT.

[FILED MARCH 27, 1889.]

Decree Modified. The decree rendered in this case in this court in this case and reported in 22 Neb., 183, modified so as to exclude therefrom lots three and four in block ten, Wymore's Addition to Wymore, Gage county.

REHEARING of case reported in 22 Neb. 183.

T. D. Cobbey, for appellant.

Winter & Kauffman, for appellees.

REESE, CH. J.

This cause was submitted October 5, 1887, and on the 12th day of the same month the decree of the district court was reversed and an opinion filed, which appears in volume 22 of the Nebraska Reports at page 183.

On the 21st day of November, of the same year, a motion to modify the judgment, and for a rehearing, was filed; and on the 18th day of January, 1888, a rehearing was allowed. On the 25th day of September, of the same year, the case was argued and again submitted.

Upon a further examination of the case, we are satisfied with the decision arrived at on the first hearing, with the exception of that part of the decree which renders lots three and four, block ten, Wymore's addition to Wymore, subject to the payment of the partnership debts of Fisher, Murphy, and Nye. These lots seem never to have formed any part of the partnership property of said firm, and from the evidence in the whole case we are satisfied that they should not have been included within the decree.

To this extent, the decree heretofore rendered in this court will be modified.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

KEARNEY COUNTY, PLAINTIFF IN ERROR, V. ROBERT
P. STEIN, DEFENDANT IN ERROR.

[FILED MARCH, 27, 1889.]

1. **Special Election for Voting Bonds: LIABILITY OF COUNTY FOR PUBLISHING NOTICE.** Where a county board calls a special election, in a township of the county, under the provisions of sections 14-17 of chapter 45 of the Compiled Statutes of 1887, for the purpose of voting upon a proposition for the issuance of the bonds of such township in aid of the construction of a railroad, and gives notice of the election in a newspaper published in the county, it was *held*, that the county was liable for the expenses of publishing the notice for the special election.
2. ———: ———. In giving the notice and causing the same to be published, issuing the bonds, and collecting the tax, the county board act as the officers of, and on behalf of the county, and not as the agents of the township.

ERROR to the district court for Kearney county. Tried below before GASLIN, J.

J. L. McPheeley, for plaintiff in error.

Robert P. Stein, and *John M. Stewart*, for defendant in error.

REESE, CH. J.

Defendant in error, who was the publisher of the *Kearney County Democrat*, a weekly newspaper published in Kearney county, presented to the county board of said county his claim for \$107.50 for publishing the notices of special elections to be held in the townships of Hayes and May, upon propositions for the issuance of the bonds of each of such townships to a railroad company proposing to construct a line of railroad therein. The claim was rejected by the county board, when he appealed to the dis-

Kearney County v. Stein.

strict court and there filed his petition, which alleged, in substance, that during the month of February, 1887, upon the request of the county of Kearney, he printed and published in his newspaper, for four weeks, the notices for the elections referred to, and that the service was of the value named, but which sum the county board had refused to pay.

To this petition the county demurred, assigning as grounds therefor, that the petition did not state facts sufficient to constitute a cause of action against the county. The demurrer was overruled, when plaintiff in error refused to answer or plead further, and judgment was rendered for the full amount claimed.

The county brings the cause to this court by proceedings in error, and assigns for error the decision of the district court in overruling the demurrer.

In addition to the admissions resulting from the interposition of the demurrer, it is conceded by plaintiff in error in its brief, that the services were rendered and were of the value named, and that the only question for decision is whether or not the county is liable for the charge.

Sections fourteen to seventeen of chapter forty-five of the Compiled Statutes, provide, in substance, that any precinct, township, or village, may issue bonds in aid of railroads, to an extent not exceeding ten per cent of the assessed value of the taxable property, in the manner provided by said sections. Among other things it is provided that in case a petition, signed by not less than fifty freeholders of a township, shall be presented to the county board, the said board shall give notice and call an election in the precinct, township, or village, as the case may be, the notice calling an election to be governed by the law regulating elections for voting bonds by the county. If the proposition be adopted by the required majority, the county board shall issue the bonds and levy the taxes for their payment.

By these provisions it will be seen that the notice must be given *by* the county board. In this act, as well as in the

matter of issuing bonds and providing for their payment, they act as county officers, and not as agents for the precinct, township, or village, desiring to vote the bonds. Every step, from the receipt of the petition to the payment of the bonds, except that of holding the election and voting thereat, must be taken by the county board as such. The precinct, town, or village, is not authorized in its corporate capacity to perform the acts mentioned. The county, through its duly elected and qualified officers, being the only power authorized to give the notices and call the election, it would seem to be pretty clear that the person publishing the notice and call, upon the order of such board, could not be required to look elsewhere for his compensation. It would, perhaps, be just that the expenses of publishing a notice and call should be borne by the precinct, township, or village, in which the election is to be held, but there is no provision of law requiring it.

Our attention has been called to the case of the *Township of Center v. Gilmore*, 31 Kansas, 675. In that case a majority of the supreme court of Kansas held that the township was liable for a similar claim.

Upon an examination of the statutes of Kansas under which the decision in that case was made, we find a difference between the laws of that state and this upon the subject under consideration, which we think prevents that case from being authority in this. It is there provided that if two-fifths of the resident tax-payers of a municipal township petition the board of county commissioners, or when two-fifths of the resident tax-payers of an incorporated city shall petition the mayor and council to submit a proposition to subscribe to the capital stock of a railroad, the county commissioners "for such county or township," or the mayor and the council for such city, shall cause an election to be held to determine whether such subscription or loan shall be made, and "thirty days' notice of such election shall be given in some newspaper published, or hav-

ing a general circulation in such county, township, or city, and the election shall be held and the returns made, and the result ascertained, in the same manner as provided by law for general elections."

Section five is as follows: "If a majority of the qualified electors voting at such election shall vote for such subscription or loan, the board of county commissioners, for and on behalf of such county or township, or the mayor and council, for and on behalf of such city, shall order the county or city clerk, as the case may be, to make such subscription or loan in the name of such county, township, or city, and shall cause such bonds, with coupons attached, as may be required by the terms of said proposition, to be issued in the name of such county, township, or city, which bonds, when issued for such county or township, shall be signed by the chairman of the board of county commissioners and attested by the county clerk, under the seal of such county; and when issued for such city shall be signed by the mayor and attested by the city clerk, under the seal of said city: *Provided*, No such bonds shall be issued until the railroad to which the subscription or loan is proposed to be made, shall be completed and in operation through the county, township, or city, voting such bonds, or to such point in such county, township, or city, as may be specified in the proposition set forth in the petition required in the first section of this act."

By this section it appears that any action taken by the county commissioners, in the matter of the issuance of bonds or subscriptions by a township, the commissioners act "*for and on behalf of*" the township issuing the bonds or making the subscription, and hence as its agents. There is no such provision in the law of this state. The county boards act solely for and on behalf of the county.

It is insisted that the township is liable for the debt due defendant in error under the provisions of sections 53 and 54 of article 2 of chapter 18, Compiled Statutes of 1887.

Section 53 provides that the compensation of town officers for services rendered their respective towns, "contingent expenses necessarily incurred for the use and benefit of the town," and the moneys authorized by vote of a town meeting for a town purpose, and other moneys directed by law to be raised for town purposes, shall be deemed town charges. By section fifty-four, it is provided that the moneys necessary to defray town charges shall be levied on the taxable property of the town in the manner prescribed by law for raising revenues. We find nothing in these sections inconsistent with the views herein expressed. The contingent expenses referred to cannot be deemed to include indebtedness created by any person other than the legally authorized officers of the town in transacting the proper corporate business of the town.

We think the decision of the district court was in accordance with the provisions of law, and correct. It is, therefore, affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

ELIZABETH A. DUNN, PLAINTIFF IN ERROR, v. SAMUEL S. DUNN, DEFENDANT IN ERROR.

[FILED MAY 2, 1889.]

1. **DIVORCE: ABANDONMENT: EVIDENCE.** An action for a legal separation on the ground of abandonment brought by the wife against her husband cannot be maintained where the uncontradicted testimony shows that about the time the action was instituted the plaintiff and defendant had freely cohabited together as husband and wife.
2. —: **COHABITATION: CONDONATION.** Where the wife, in a cross-bill was charged by the husband with certain acts of cruelty committed against him, and it appeared that after such alleged acts he freely cohabited with the plaintiff as his wife, he will be held to have condoned the offenses.

3. ———. The marriage relation is designed to continue so long as both the parties entering into it shall live; and the relation will not be dissolved except for adequate legal cause.

ERROR to the district court for Clay county. Tried below before MORRIS, J.

Dilworth, Smith & Dilworth, for plaintiff in error.

L. G. Hurd, and *Thomas Ryan*, for defendant in error.

MAXWELL, J.

This action was brought by the plaintiff against the defendant for a decree of separation and alimony, on the ground of abandonment.

The defendant answered the plaintiff's petition, in effect denying all the allegations contained therein, except the marriage of the parties. He also filed a cross-petition on the ground of cruelty.

The plaintiff, in answer to the cross-petition, pleaded condonation. On the trial of the cause the court found that there had been no abandonment of the plaintiff by the defendant, and dismissed the plaintiff's petition. The court found the facts stated in the defendant's cross-petition to be true, and rendered a decree of divorce thereon, with \$1,000 alimony to the plaintiff.

The testimony shows that the marriage took place on the 2d day of February, 1879, at Thompson, Illinois, and that the parties continued to live together as husband and wife until the 20th of August, 1880; that prior to the marriage the plaintiff was conducting a millinery store at Thompson, Illinois, and was possessed of property of the value of from \$4,000 to \$6,000. So far as this record discloses, she was industrious and economical, with considerable business ability. The defendant, at the time of the marriage, had children by a former wife, living at Thompson, and pos-

assessed two farms near that place, which were quite valuable, although somewhat incumbered with liens.

The exact cause of the disagreement between the parties does not appear. The defendant claims that the plaintiff has a high temper, which at times she does not control; while she claims that the defendant, while of sufficient ability, failed to provide a suitable support for her, and there is testimony tending to sustain both charges. On the 20th of August, 1880, the parties had some difficulty, and the defendant claims that the plaintiff ordered him to leave the house, and that in compliance therewith, he did so leave, and has remained away ever since. The evidence seems to be sufficient to sustain the plaintiff's charge of abandonment, and unless the testimony shows cohabitation of the parties since that time, she will be entitled to a decree as prayed. The date when the original petition was filed does not appear, but an amended petition was filed in 1882, and a motion made by the defendant to strike that petition from the files, was overruled in May, 1883. The defendant thereupon, in May, 1883, filed his answer and cross-petition. The defendant, about the year 1880, removed to this state, and the next year his wife followed. He testifies on cross-examination:

Q. You say you have not lived with her, the plaintiff, since the time you claim she struck you with a hatchet?

A. Yes, sir; that is all I ever lived with her. In the latter part of May or June, 1881, I went east to Illinois, and when I came back, I found two or three letters here from my wife. She was down at Fairmont, and she wanted that I should take her down to Kansas, and I did so.

Q. That was in 1881?

A. Yes, sir.

Q. That was after the time she struck you with the hatchet?

A. Yes, sir.

Q. Where did you go on that trip?

A. In those letters she wanted me to take her down to Kansas, to her sons, and that is where we went.

Q. Did you stop at a hotel in Grafton on your way down?

A. No, sir, not on my way down.

Q. Did you stop at any hotel, or at any place, going down?

A. Not on the way down. When I went for her, I got her in the afternoon. It was between Grafton and Fairmont. I drove up to the house, and she came out; I told her I was going to Fairmont.

Q. Did you stop at any hotel going down?

A. Yes, sir.

Q. Did you stop at any hotel in Grafton?

A. Yes, sir.

Q. Did you stop at any hotel in Hebron going down?

A. Yes, sir.

Q. Did you have your wife with you at the time?

A. Yes, sir.

Q. Did you occupy the same room?

A. Yes, sir.

Q. At one or both of the places?

A. Yes, sir.

Q. Did you cohabit with the plaintiff at one or both of these places?

A. No, sir.

Q. Did you visit this plaintiff, in the year 1882, in a room in Sawtell's building?

A. Yes, sir.

Q. Did you or did you not cohabit with the plaintiff there?

A. No, sir, I did not.

Q. Did you visit the plaintiff at a room in Sawtell's building in this town, after you had filed your answer in this case?

A. Yes, sir; she met me on the street, and wanted I

should come up to her room, and said that she wanted to see me; and I went up there and commenced talking about our trouble, and I commenced talking about business and our trouble, and wanted to fix the matter up with her, and she flew off in one of her spells, or crazy spells, and commenced crying and bellowing as loud as a person could; and I got up and left.

Q. Did you or did you not cohabit with the plaintiff there?

A. No, sir, I did not.

RE-DIRECT EXAMINATION.

Q. You may state under what circumstances she got into your buggy, on the occasion of your going to Kansas, as you were about to state them in your cross-examination.

A. I drove up to the house where she was, and she came out to the buggy, and I told her I was going to Fairmont, and if she wanted to go to Kansas, I would be back in the morning to take her down to Kansas, and she asked me if she could not take a ride with me, and I told her she could, and we got into the buggy and drove out around and back to the house for her to get out, and she would not get out of the buggy, and she said she was going wherever I went. I tried to prevail upon her to get out of the buggy, and she insisted that she wouldn't, that she was going wherever I went, and I was forced to go somewhere and so I drove to Grafton.

The letter of the defendant to the plaintiff referred to, is as follows:

"HARVARD, NEB., May 30, 1881.

"*Mrs. E. A. Dunn, Fairmont:* Do you want me to take you to Kansas? If so, let me know by return mail. All well.

Yours truly, S. S. DUNN."

The plaintiff testifies that at the places where they stopped for the night, the defendant had sexual intercourse with her, and that he had such intercourse at various times afterwards

Dunn v. Dunn.

when he called to see her at her room. The proof of cruelty upon the part of the plaintiff consists of two principal charges: first, that he woke up in the night and saw his wife flourishing a revolver near his bed; and second, that on the 20th of August, 1880, she struck him with the back of a hatchet. For aught that appears, this blow may have been accidental; and the testimony as to the revolver is of a very unsatisfactory character, and is unequivocally denied by the plaintiff. But even if acts of cruelty were committed against the defendant, he condoned the offense. Condonation is a defense whether the cause of divorce is adultery, cruelty, or other ground. (*Gardner v. Gardner*, 2 Gray, 434; *Sullivan v. Sullivan*, 34 Ind. 368; *Phillips v. Phillips*, 27 Wis. 252.)

Condonation may be inferred from cohabitation with knowledge of the offense, after the conduct complained of. (*Williamson v. Williamson*, 1 Johns. Ch. 488; *Wood v. Wood*, 2 Paige Ch. 108; *Bronson v. Bronson*, 7 Phila. 405; *Buckholts v. Buckholts*, 24 Ga. 238; *Twyman v. Twyman*, 27 Mo. 383; *Davies v. Davies*, 55 Barb. 130; 4 Am. and Eng. Encyc. of Law, 822.) From cohabitation sexual intercourse, and from sexual intercourse forgiveness, is implied. (*Burns v. Burns*, 60 Ind. 259; *Harper v. Harper*, 29 Mo. 301.) In our view, therefore, the defendant condoned the plaintiff's alleged cruelty toward him, and as all the testimony shows that the parties cohabited as man and wife about the time this action was brought, the charge of abandonment for two years before the bringing of the action fails.

The marriage relation was instituted by the Creator, and it was designed that the parties who should take upon themselves the marriage vow should regard it as permanent so long as they both should live. Our statute for certain causes authorizes a dissolution of the marriage relation; but mere rudeness of language, petulance of manners, austerity of temper, or even occasional sallies of passion, if they do not threaten personal violence, do not constitute legal cruelty.

Plummer v. Rummel.

(*Gleason v. Gleason*, 16 Neb. 16.) It is evident that both the plaintiff and defendant in this case are respectable people, and if each will exercise a reasonable amount of forbearance toward the other, no sufficient reason is shown why they may not live together as husband and wife. In any event, to entitle them to a divorce, sufficient cause must be shown; and as there is a failure in that regard, the judgment of the district court must be reversed and the cause dismissed.

REVERSED AND DISMISSED.

THE other Judges concur.

ELI PLUMMER ET AL., APPELLANTS, V. GEORGE W.
RUMMEL ET AL., APPELLEES.

[FILED MAY 2, 1889.]

1. **Fraudulent Conveyances: EVIDENCE.** Where a father, in failing circumstances and unable to pay his debts, conveyed land to his daughter for an alleged consideration stated in the deed, of \$1,200, *held*, that it devolved on the daughter to prove the actual consideration paid, and that she purchased the land in good faith.
2. — : —. Transactions between relatives, by reason of which strangers who have sold goods to some of such relatives will be deprived of payment therefor, will be scrutinized very closely, and the good faith of the same must be clearly established.

APPEAL from the district court of Frontier county.
Heard below before COCHRAN, J.

G. M. Lambertson, and *H. J. Whitmore*, for appellants.

George H. Stewart, for appellees.

26	142
43	545
26	142
44	782
26	142
50	697
54	516
54	778
26	142
62	806

MAXWELL, J.

This is an action in the nature of a creditor's bill to subject certain real estate in Frontier county, held in the name of Lillie J. McClary, but which the plaintiffs claim is the property of George W. Rummel, to the payment of his debts.

The plaintiffs, for several years, have been engaged in business as wholesale grocers in the city of Lincoln. The defendant, Rummel, from some time in the early part of 1887 until February 13, 1888, was engaged in the retail grocery trade in the same place. During the time he was so engaged he purchased goods of the plaintiffs and became indebted to them in a large amount. To secure credit, he at various times represented to plaintiffs that he was worth certain specified sums over and above all indebtedness, and that he owned land in Frontier county. On the 13th day of February, 1888, he failed in business, and to secure in part the claim of the plaintiffs, he executed to them a chattel mortgage upon his stock of goods for the sum of \$1,550. The stock was sold and the proceeds applied upon the debt, leaving a balance of about \$775.40 still due to plaintiffs. Judgment was afterward obtained in the county court of Lancaster county for this sum, and transcripts filed in the district courts of both Lancaster and Frontier counties. Executions were issued and returned unsatisfied. By plaintiffs' direction, execution was then levied on certain lands in Frontier county held in the name of Lillie McClary, and this action commenced to subject it to the payment of plaintiffs' claim. On the trial of the cause judgment was rendered in favor of the defendants and the action dismissed.

An examination of the record of the title to the land shows that Mr. Rummel had received a deed to the land in September 1887, and that he had conveyed the land to his daughter, Lillie J. McClary, on December 21, 1887, which

deed was not filed for record until February 16, 1888, three days after Mr. Rummel's failure. The consideration stated in the deed is \$1,200, and the grantee assumed a mortgage of \$425.00 then on the land.

The plaintiffs contend that this conveyance to Mrs. McClary was given for no consideration, was to hinder and delay creditors, and is therefore fraudulent and void as to them. In support of their position they prove that Mr. Rummel had represented to them at various times both before and after the date of the deed to Mrs. McClary, and while the debt was being contracted, that he owned this land in Frontier county; that he tried to sell it, and put it in the hands of parties in Lincoln to sell after the 21st of December; that after his failure he claimed to have control of the land and that it was all he had saved from the wreck. It was also shown that the title had actually remained of record in him until three days after his failure; also, that he had executed to certain others of his creditors after his failure a mortgage on land in Illinois which he claimed he had previously conveyed to his son, but which he still owned.

Mrs. McClary, on cross-examination, testified in regard to the transaction:

A. My husband and my father had a land deal for some goods coming to my husband; there still was \$262.50; when he came home he told me I could have that, and turned it over to me, and when I went back to Lincoln I told my father I would take the land, as I was wishing to purchase land in Lincoln and thought I could use the land in that case.

Q. Then you never paid your father anything?

A. I paid him \$262.50.

Q. Did you have \$262.50 in money or in property of any kind?

A. I did; yes, sir.

Q. What was it?

A. It is in land.

Q. In what shape was it in at the time you gave it to your father?

A. In the same shape it is now; I owed nothing on it.

Q. Then you mean to have the court understand that your husband told you you might have \$262.50 that your father owed to your husband?

A. Yes, sir.

Q. And that you received, then, from your father, a deed to this land, after that?

A. I did.

Q. Then you never paid your husband anything for this land?

A. My husband and I have deals back and forth in land. I have my own property; he has his.

Q. Did you ever pay your husband anything for this \$262.50?

A. Why, he was owing me at the time, so it didn't make any difference.

Mr. McClary also testified on his direct examination:

Q. What is the value of that land, or what was it on the 21st day of December, 1887?

A. Well, I bought it about two months, I think, before that, for \$30; on the mortgage.

Q. What was it worth on the market then?

A. Why, I should judge it was worth about —; it was worth about \$50, I should judge, over and above the mortgage; I wouldn't have taken it for that.

Q. Do you know what your wife paid for that piece of land?

A. Well, not exactly; I couldn't say; I wasn't there; but I gave her—I gave her an account against Rummel for \$262.50, that is, in some trades that we had had before; I traded part of her stock for some land, and traded then to Mr. Rummel and turned over to her part of the property, and Rummel's account was among.

Q. State how the indebtedness of Mr. Rummel to you was created?

A. It was created in a deal I had with him wherein I traded him some land for a stock of groceries, and after the invoice was made there was a balance of \$262.50; I can go on still further why it was left in that shape: I thought at that time of keeping the goods and bringing them up here, and he thought of making up the balance in groceries, but afterwards, in coming here, I traded—traded the stock off before they were moved from Lincoln.

Q. Who to?

A. D. R. Callahan, of Curtis; traded him all but the fixtures; those I sold in Lincoln when I went back, so I had no more use for groceries.

Q. State if at the time this conveyance was received from Rummel to your wife, you were indebted to your wife in any amount, and if so, in how much, and in what manner was the indebtedness created?

A. Well, I was indebted to her, I considered, or we considered, in the trade—in the deal of these groceries and the land, about half and half; I traded stock for the land. I traded to him horses, and about half of the horses belonged to her, so she was in about half in the grocery deal, and this was one of the claims I turned over to her. I turned over all the claims and kept what money I got out of it. Well, the other I got in the hotel building up here; that was turned over to her.

In his cross-examination he testified that he traded eight horses, worth \$600, for land, and that he traded that land to Rummel, his father-in-law, for \$1,600 worth of groceries in Lincoln, and that there was still a balance due from Rummel upon the land of \$262.50, which McClary gave to his wife, and was the consideration for the deed in question.

It will be observed that the defendants failed to agree as to the alleged consideration paid to Rummel, and failed to

show that, in fact, they paid any actual consideration for the land. Rummel does not testify, but the testimony is clear and uncontradicted that he claimed to be the owner of the land in dispute, although the title was in the name of his daughter; and he did execute a mortgage to Hargreaves Bros. upon certain real estate near Quincy, Illinois, but saying at the time that the title probably was in the name of his son. The plaintiffs had furnished Rummel with goods to carry on his business in Lincoln, and are entitled to payment therefor from any property possessed by him and not exempt from execution, whether the title of such property is in his own name or not. A court of equity will lay its hand upon such property and apply to the payment of the amount due the judgment creditor. The case in some of its features resembles that of *Bartlett v. Cheesbrough*, 23 Neb. 767, where it was held that transactions between relatives, by reason of which, strangers, who sold goods to some of such relatives, will be deprived of payment therefor, will be scrutinized very closely, and the good faith of the same must be clearly established. It was also held in that case, that it devolved upon the father to prove the actual consideration paid to his son, and the *bona fides* of the transaction.

That, we think, is a correct statement of the law, and if applied to the facts of the case under consideration, the judgment is clearly erroneous. The judgment of the district court is reversed, and a decree will be entered in this court in favor of the plaintiffs and subjecting the land in controversy to the payment of their judgment.

DECREE ACCORDINGLY.

THE other Judges concur.

26	148
38	531
28	148
40	273

ADAMS COUNTY BANK, PLAINTIFF IN ERROR, V. G. S.
MORGAN, DEFENDANT IN ERROR.

[FILED MARCH 27, 1889.]

1. **Attachment: DISSOLUTION: UNDERTAKING.** Where a motion to discharge an attachment is sustained, and the plaintiff fails to file an undertaking for the retention of the attached property, while he thereby loses his attachment lien on such property, yet as the order discharging the attachment is a final order, he may have it reviewed on error. In other words, the undertaking mentioned in section 236e of the Code is necessary only for the purpose of retaining the attachment lien pending the proceedings in error.
2. ———. Evidence examined, and *held*, to show no cause for an attachment.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Batty & Casto, for plaintiff in error.

A. H. Bowen, and *C. Hoepfner*, for defendant in error.

MAXWELL, J.

In March, 1887, the plaintiff commenced an action by attachment against the defendant to recover the sum of \$520.90. The defendant thereupon filed a motion, supported by affidavits, to discharge the attachment. Counter affidavits were filed, and on the hearing the attachment was dissolved. To this the plaintiff excepted, but did not ask the court to fix the number of days in which to file an undertaking and petition in error for a review in this court of the ruling complained of, and no such undertaking has been given. The defendant contends that, by reason of the failure to comply with the statute in this respect, it deprives the plaintiff of the right of such review.

Section 236e of the Code of Civil Procedure provides: "That when an order discharging an order of attachment is made, and any party affected thereby shall except thereto, the court or judge shall fix the number of days, not to exceed twenty, in which such party may file his petition in error, during which time the property attached shall be held by the sheriff or other officer, during which period the petition in error shall be filed, and the party filing the same shall give an undertaking to the adverse party, with surety or sureties to be approved by the court, in double the amount of the appraised value of the property attached, conditioned to pay said adverse party all damages sustained by such party in consequence of the filing of said petition in error, in the event that such order of attachment shall be discharged by the court in which said petition in error shall be filed, as having been unlawfully obtained."

This section applies alone to the retention of the lien of the attachment; that is, if the attaching creditor desires to retain his attachment lien upon the property attached until the ruling on the motion to discharge can be reviewed in the appellate court, he must, within such time as the court shall fix, not exceeding twenty days, give an undertaking to the adverse party, with approved sureties, in double the appraised value of the property, conditioned, etc. If the undertaking is not given, the property will be released absolutely from the lien of the attachment, but such failure goes no further than that.

Section 581 of the code declares that: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this title."

Section 582 provides that: "A judgment rendered or final

order made by the district court, may be reversed, vacated, or modified, by the supreme court for errors appearing on the record."

A ruling of the district court discharging an attachment is a final order and is subject to review. (*Turpin v. Coates*, 12 Neb. 321.) In the case cited it is said that: "The object of an attachment is to obtain sufficient property or credits of the debtor to satisfy the judgment which may be recovered. This right, under certain conditions the statute gives. If a court improperly deprives a party of the benefit of this proceeding, is he not thereby deprived of a substantial right? A special proceeding may be said to include every special statutory remedy which is not in itself an action. We have no doubt that an order discharging garnishees, is an order affecting a substantial right, made in a special proceeding. Such an order in many cases would entirely defeat the collection of a debt. Neither is it necessary to wait until final judgment before such order can be reviewed. No judgment can be rendered against the garnishees until after final judgment against the debtor; but if the attachment is not dissolved, the creditor has a right to the security obtained by the proceedings in garnishment for the satisfaction of any judgment he may obtain."

The discharge of the attachment whereby the plaintiff was deprived of his lien upon the property in question, was a final order, and subject to review in this court, although no undertaking was given. The plaintiff has the right to protect itself, if it can, from liability for costs or damages by reason of the attachment proceedings, and therefore may have the evidence and points of law arising in the case reviewed in the supreme court. This objection, therefore, is of no avail.

The testimony fails to show any cause for an attachment. The defendant was engaged in the grocery business at Hastings. The plaintiff claims that at the time he commenced business with it, he represented that Sloan, Johnson & Co.,

State v. Sheldon.

of Omaha, were silent partners in the business. The defendant swears that he stated that Mr. Sloan, of Sloan, Johnson & Co., was a silent partner, and such seems to have been the fact; yet the plaintiff before attaching the defendant's property seems to have made no inquiry of Mr. Sloan, or of Sloan, Johnson & Co., as to the facts concerning the alleged partnership. Had such inquiry been made of Mr. Sloan, it is evident that no attachment would have been issued. In any event there is an utter failure to prove any of the grounds for the attachment, and the order discharging the same is right, and is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

THE STATE OF NEBRASKA, EX REL. GEORGE D. NOBLE, V. HENRY SHELDON.

[FILED MAY 2, 1889.]

Practice: AFFIRMANCE OF JUDGMENT IN SUPREME COURT. Where a judgment of the district court has been simply affirmed in the supreme court, the clerk of the district court upon receiving a mandate to that effect may issue an execution on the original judgment. On a simple affirmance no action of the trial court is necessary before issuing an execution.

ORIGINAL application for mandamus.

C. H. Sloan, for relator.

No appearance for respondent.

MAXWELL, J.

This is an application for a mandamus to compel the defendant to issue an execution upon the affirmance by this

court of a judgment in the district court of which he is clerk. The relator alleges in his petition that: "The defendant is the clerk of the district court of Fillmore county, Nebraska; that there was a suit pending in said court between Martin E. Kinney, who was plaintiff, and William J. Yates, who was defendant; that on the 29th day of May, 1886, said plaintiff obtained a judgment in said cause against said defendant, William J. Yates, who brought the said cause to this court on a writ of error, where in due time the same was affirmed, and on the 19th day of February, 1889, the clerk of this court issued a mandate in due form to the district court of said Fillmore county, and said mandate is now on file in the office of said clerk of said court.

"On the 4th day of August, 1887, the plaintiff in said suit for value assigned said judgment to this relator, George D. Noble, which said assignment now is, and has been for a long time, on file in the office of the said defendant," etc. It is alleged that \$100, has been paid on said judgment, and no more, and that the defendant refuses to issue an execution for the amount remaining unpaid. The defendant makes no defense, so that the only question is, Is it his duty, on a demand being made therefor, to issue an execution?

Section 594 of the Code provides that: "When a judgment or final order shall be reversed, either in whole or in part, in the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment; and the court reversing such judgment or final order, shall not issue execution in causes that are removed before them on error, on which they pronounced judgment as aforesaid, but shall send a special mandate to the court below, as the case may require, to award execution thereupon; and it shall be the duty of the judges of the supreme court to prepare and file their opinion in every case as brought before them, within sixty days after the decision of the same, and no mandate shall be sent to the court

below until the opinion provided for by this section has been filed. The court to which such special mandate is sent, shall proceed in such case in the same manner as if such judgment or final order had been rendered therein, and on motion and good cause shown, it may suspend any execution made returnable before it by order of the supreme court, in the same manner as if such execution had been issued from its own court; but such power shall not extend further than to stay proceedings until the matter can be further heard by the supreme court."

Where a judgment of a district court has been reversed or modified, and a mandate sent to that court to carry the modified judgment into effect, it then devolves on such court to carry out the requirements of the mandate, and no execution can lawfully be issued on the judgment until this has been done. In other words, it is the duty of the court below to enter the mandate and obey it. (*Levin v. Hanley*, Wright's R. 588.)

Where, however, the judgment of the court below has been simply affirmed, the writer, after a pretty careful examination of the cases, has been unable to find a single case where it was held necessary for the court to act upon such mandate before an execution could be issued. There would be nothing for the court to do. The judgment having been entered in that court, would have been carried into effect but for the appellate proceedings in the supreme court. When, therefore, such proceedings terminated in the unqualified affirmance of the judgment, and a mandate to that effect was issued to the trial court stating such affirmance and directing it to carry the judgment into effect, there certainly can be no impediment in the way of enforcing the judgment by execution.

The policy of the law is to have the practice as simple as is consistent with the protection of the rights of parties, and to impose no unnecessary conditions. To require the action of the trial court upon a mandate where there is

a mere affirmance of a judgment, would be imposing a needless condition, and cause a delay in many cases of many months in the issuing of an execution which has already been delayed for a considerable period by the appellate proceedings.

In *Howard v. Abbey*, 1 W. L. M. 278, it was held that where the judgment of the court below has been simply affirmed in the supreme court, the clerk of the court below, on being satisfied of that fact by the journal entry thereof in the supreme court, may issue an execution on the original judgment.

In *Earl's Lessee v. Shoulder*, 6 Ohio, 409, it was sought to enjoin an action in ejectment upon the ground that an execution had been issued without a mandate having been issued and entered of record; but a sale of the real estate had been had and confirmed under which one of the parties claimed title. The bill was dismissed.

It is apparent that it is the duty of the defendant to issue an execution on the judgment in this case, and a writ of mandamus to that effect will be issued.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

STATE OF NEBRASKA, EX REL. CITY OF BEATRICE, v.
THOMAS H. BENTON, AUDITOR.

[FILED MAY 2, 1889.]

Cities of Second Class: BONDS. District bonds issued for curbing and guttering streets of a city of the second class, etc., cannot be issued for the guttering and curbing of the intersections of streets, nor any part thereof.

ORIGINAL application for mandamus.

L. M. Pemberton, for relator.

William Leese, Attorney General, for respondent.

MAXWELL, J.

This action is brought to compel the defendant to register certain bonds issued by the city of Beatrice called curbing and guttering bonds of paving districts numbers one, two, and three, respectively. It is admitted that the validity of the bonds in question, except at the intersection of streets, and the space opposite alleys, rests upon substantially the same ground as district paving bonds. (*State v. Benton*, 25 Neb. 762.) There is no allegation in the petition, however, showing that the bonds were issued exclusively as district curbing and guttering bonds, and therefore a proper charge upon the several lots of the respective districts. Thus, suppose each of the blocks of the city to extend along the streets to be paved 300 feet, and that the sidewalks on the streets crossing such paved streets are twelve feet in width: it is evident that the curbing and guttering must extend beyond the corner of each of the said blocks at least the full width of the sidewalks on such cross streets, and therefore, to that extent, do not come within the definition of district curbing and guttering bonds to be charged as a lien upon specific lots, but properly come under the head of bonds for paving the intersections of streets and spaces opposite alleys. The issue of intersection bonds can alone be authorized by a vote of a majority of the electors of the city voting at an election duly called and held. As the petition fails to state a case entitling the relator to the relief prayed for, the writ must be denied.

WRIT DENIED.

THE other Judges concur.

JAMES LEWIS, PLAINTIFF IN ERROR, V. HENRY OWEN
ET AL., DEFENDANTS IN ERROR.

[FILED MAY 2, 1889.]

Contract: STATUTE OF FRAUDS: CONSIDERATION. A petition which states that the defendant was a contractor for the grading of a certain railway; that he had certain employes and sub-contractors under him engaged in the grading who furnished their own teams; that he verbally employed the plaintiff to care for and furnish "all medical treatment and medical and surgical service and medicine which the plaintiff might render to said horses and mules" of the said parties; that in pursuance of said contract the plaintiff rendered certain services and furnished certain medicine for the horses and mules of the said parties which amounted to \$49.50, an itemized copy of the account being set out in the petition, and it being claimed that there is due from the defendants to the plaintiff the sum above specified; *Held*: 1. That if the allegations of the petition are true, the promise was direct to pay for the services, if rendered. 2. If the services were rendered in pursuance of the promise, there was sufficient consideration.

ERROR to the district court for Greeley county. Tried below before TIFFANY, J.

H. G. Bell, and *T. J. Doyle*, for plaintiff in error, cited: *Maurin v. Fogelberg*, 32 N. W. Rep. 858; *Fitzgerald v. Morrissey*, 14 Neb. 199; *Sutherland v. Carter*, 17 N. W. Rep. 780.

Paul & Templin, for defendant in error, cited: 7 Wait's Ac. and Def., 13, sec. 9, pp. 14 to 18, inclusive; *Laidlow v. Hatch*, 75 Ill. 11; *Morrissey v. Kinsey*, 16 Neb. 17.

MAXWELL, J.

This action was brought by the plaintiff against the defendants to recover for services, etc., rendered to certain par-

ties, it is alleged, at the defendants' request. A demurrer to the petition was sustained in the court below, and the action dismissed. The question presented is the sufficiency of the petition. It is as follows, omitting the formal parts and the account.

"Plaintiff complaining of defendants says: that said defendants are justly indebted to him in the sum of \$48.50; and for cause of action says that heretofore, to wit, on the day of July, 1887, said defendants were engaged in making and grading a portion of the road-bed of the Lincoln & Black Hills railroad in Greeley county, Nebraska, as contractors, and that said defendants at said time had in their employ, as grade hands working on said grade, the following-named persons, to wit: Lewis Blackwell, J. B. Tracy, E. E. Holbrock, T. J. Woods, and John Woods, which last two named parties were so working and carrying on said work and business under the firm name of T. J. Woods & Son; that all the aforesaid parties, while working on said grade for said defendants, furnished respectively their own stock for carrying on said work, to wit, horses and mules.

"2. That said defendants at said time, with the view and for the purpose of procuring medical treatment for the horses and mules of said parties while in their (defendants') employ, and of keeping said horses and mules in a better condition than they otherwise would be for performing said work, and thus enable defendants to expedite the completion of the same, entered into a verbal contract with plaintiff by the terms of which said contract said defendants covenanted and agreed to and with plaintiff to pay plaintiff for any and all medical treatment and medical and surgical service and medicine which he, plaintiff, might render to said horses and mules of the aforesaid parties; and defendants at said time requested plaintiff to procure an order from T. J. Woods & Son, on them, defendants, in their firm name, for all medicine furnished and medical and surgical treatment

rendered for the horses and mules of said T. J. Woods & Son, and they, defendants, would pay said order when presented to them by plaintiff.

"3. That in pursuance of said contract, and in strict conformity to the terms thereof, plaintiff did, at the dates hereinafter mentioned, furnish the following items of medicine, and render the following medical and surgical treatment, to said horses and mules for and on account of said defendants."

An itemized copy of the account is set out in the petition, also an order from T. J. Woods & Son on the defendant for \$37.50 for "doctoring horses and mules, and medicines furnished same, for T. J. Woods & Son," etc.; and it is alleged that there is due from the defendants to plaintiff thereon a specified sum, for which the plaintiff prays judgment.

The petition evidently states a cause of action. If the allegations thereof are true, the defendants, who were contractors in the grading of a certain railroad, had certain employes or subcontractors under them who furnished their own teams in doing the work; that the defendants thereupon employed the plaintiff to render certain services in the care of and promoting the efficiency of the teams of such employes and subcontractors; that thereupon the plaintiff rendered the services requested, which were of the value of \$49.50.

In the brief of the defendants in error it is said that there is a want of consideration for the contract, and we are inferentially told that there was no motive for the defendants to enter into such contract. The motive, no doubt, was the early completion of the grading, which the defendants probably supposed would be more rapidly done if the teams were kept in good condition. The motive, however, would not be material if the defendants employed the plaintiff to render the service sued for and promised to pay for the same; and that in pursuance of such employment he did render the

Chollette v. O. & R. V. R. R. Co.

services. In such case there would be sufficient consideration to support the promise.

The defendants in error have filed a transcript of the proceedings before the justice, and claim that the demurrer reaches those proceedings as well as the petition, and that there is a variance between the action as originally commenced and the petition in this case. If this were true it could not be reached by a general demurrer; but there does not seem to be any material variance between the original action and the petition herein. The petition, while not as formal in some respects as could be desired, yet contains sufficient to show a liability of the defendants to the plaintiff. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other Judges concur.

ELIZA CHOLLETTE, PLAINTIFF IN ERROR, V. OMAHA
& REPUBLICAN VALLEY RAILROAD COMPANY, DE-
FENDANT IN ERROR.

[FILED APRIL 4, 1889.]

1. **Railroads: TRANSFER OF CORPORATE POWERS: LIABILITY.** A railroad company organized and incorporated under the laws of this state cannot absolve itself from the performance of duties imposed upon it by law, nor relieve itself from liability for the wrongful acts or omissions of duty of persons operating its road, by transferring its corporate powers, or permitting others to operate its road as owners of its capital stock. To allow it to do so would be contrary to the public policy of the state as expressed in its constitution and laws with reference to railroad companies.
2. ———: ———: ———. The original obligation of a railroad company to the public cannot be discharged by a transfer of its fran-

26	159
33	143
96	159
41	582
96	159
54	751
26	159
58	681
26	159
59	694

chises to another company, except by legislative enactment consenting to and authorizing such transfer, with an exemption granted to such company relieving it from liability. Mere legislative consent to the transfer is not sufficient; there must be a release from the obligations of the company to the public.

3. ———. INJURIES TO PERSON: DAMAGES. Plaintiff applied to an agent in the ticket office at the station at W. on defendant's road, for a ticket to E., on the U. P. R. R., a number of miles east of the eastern terminus of defendant's road, which was on the line of the U. P. R. R., and by such agent was furnished a single local ticket from W. to E. By direction of the agents in charge of the train, she took her seat in the car in which she was carried to the junction of the two roads and on to E. without change. At E., plaintiff was injured while alighting from the train, the injury being caused by the alleged negligence of those in charge of the train. *Held*, That in such case the defendant would be liable under the provisions of section 3, article 1 chapter 72, Compiled Statutes, for the damages sustained.

ERROR to the district court for Saunders county. Tried below before Post, J.

Bell & Sornborger, for plaintiff in error, cited: *Balsley v. St. L. A. & T. H. R. R. Co.*, 119 Ill. 68; see collection of cases, Am. and Eng. Encyc. of Law, Vol. 2, p. 756, title, "Carriers of Passengers," paragraph 25, sub-title, "Lessors and Lessees;" *G. W. Railway v. Blake*, 7 H. & N. 987; *Quimby v. Vanderbilt*, 17 N. Y. 306; *W. St. L. & P. Ry. v. Peyton*, 106 Ill. 534; *L. & N. R. R. v. Weaver*, 9 Lea, (Tenn.,) 38; *Carter v. Peck*, 4 Tenn. 203; Hutchinson on Carriers, secs. 158, 160, 170, 153 and notes 1 and 2; *Pearce v. R. R. Co.*, 21 How. 441; *Champion v. Bostwick*, 18 Wend. 175; *Cobb v. Abbot*, 14 Pick. 289.

J. M. Thurston, *W. R. Kelly*, *J. S. Shropshire*, and *W. W. Cotton*, for defendant in error, cited: *Singleton v. R. R. Co.*, 70 Georgia, 464, cited by plaintiff, and the collection of cases found in paragraph 26, following the one referred to by plaintiff in Am. and Eng. Encyc. of Law, Vol. 2, page 756, title, "Carriers of Passengers;" *Hood v. N. Y.*

Chollette v. O. & R. V. R. R. Co.

& *N. Haven R. R. Co.*, 22 Conn. 1; Wood on R. R. Law, p. 1417; *Milnor v. N. Y. & N. H. R. R. Co.*, 53 N. Y. 363.

REESE, CH. J.

This action was instituted in the district court of Saunders county by plaintiff against defendant, and was for damages alleged to have resulted from a personal injury received by plaintiff, while a passenger on defendant's road and in its cars, through the negligence of defendant's agents in starting the train before plaintiff could alight from the car at Elkhorn, by which she was thrown violently down and seriously injured.

It was alleged in the petition that defendant was a railroad corporation, duly organized and incorporated under the laws of the State of Nebraska, and was, on the date of the injury, the owner of and operating a line of railroad as a common carrier of passengers, running from and through the city of Wahoo, in Saunders county, to and through the village of Elkhorn, in Douglas county; that on the 31st day of December, 1886, in consideration of the payment by plaintiff to defendant of the required fare for such service, the defendant received her as a passenger on its road, to be transported from Wahoo to Elkhorn; that in consideration of the fare paid by plaintiff, defendant promised and undertook to transport her as aforesaid, and to furnish suitable means, and allow sufficient time for her to enter into and alight from its cars, but that by the negligence of defendant, in failing and refusing to allow her sufficient time to alight from its cars at Elkhorn, and by negligently starting the car on which she was then riding before she had a reasonable time to alight therefrom, she was thrown down and the injury received, to her damage, etc.

For answer, defendant admitted that it was a railroad corporation duly organized and incorporated under the laws

of this state, but denied that it was, at the date of the happening of the events described in plaintiff's petition, operating a line of road as a common carrier from Wahoo to Elkhorn; but alleged that it was the owner of a line of road from Valley, in the county of Douglas, to and through the city of Wahoo, in Saunders county, and that the village of Elkhorn was not in nor on any part of its line of road.

For a second defense it was averred that defendant was a railroad corporation organized as aforesaid, but denied that it was operating the road from Wahoo to Elkhorn, said last-named point being situated many miles eastward from the terminus of defendant's road, and upon the Union Pacific railroad. It was further denied that defendant was operating its line of railroad, and it was alleged that defendant's line of road was operated exclusively by the Union Pacific Railway Company, a corporation organized under and by virtue of the laws of the United States, and that said Union Pacific Railway Company was operating defendant's line of railroad by reason and because of its ownership of all the capital stock of defendant, and that by reason of such ownership, the Union Pacific Railway Company, by its agents and servants, had the exclusive possession and control of all of the property of defendant, and was in exclusive possession and control of all the stations and trains operated upon and along the line of defendant's road, and that at the time mentioned in the petition, defendant had no agent nor servant in Saunders or Douglas county, and that if plaintiff purchased a ticket, as alleged in her petition, such purchase was made of and the ticket obtained from the Union Pacific Railway Company, and not from defendant nor any of its agents nor servants.

The third defense set up in the answer consisted of a denial of the reception of plaintiff by defendant as a passenger, the sale of a ticket to her, or receipt of fare, or that defendant was under any obligations to transport plaintiff. All carelessness or negligence on its part was also denied,

as well as all injury to plaintiff. It was also alleged that if any such injuries were received or sustained, they were received while plaintiff was a passenger upon the cars of the Union Pacific railway, and not upon those of defendant; and that any contract made for the purchase of a ticket from any person or agent at the time alleged, was made with and purchased from the Union Pacific Railway Company, which had charge of the train. It was also alleged that whatever injuries were received were by reason of the contributory negligence of plaintiff.

To this answer, plaintiff filed her reply admitting that the village of Elkhorn was not situated on the defendant's line of railroad, but was several miles eastward from its eastern terminus on the line of the Union Pacific railroad. The allegations of the answer concerning the use and occupation of defendant's road by the Union Pacific Railway Company were denied, and it was alleged that the Union Pacific Railway Company had no power nor authority to become the stockholder of defendant, and that it did not operate the line of road as alleged in the answer, and that the agents and servants referred to in the petition and answer were the agents and servants of defendant.

It was denied that plaintiff purchased her ticket from or made any contract for her transportation with the Union Pacific Railway Company, but that she applied at the usual and well-known office of defendant, situated on its line of road and on its right-of-way, and that in response to such application to the persons in charge, she was sold a ticket for continuous passage from Wahoo to Elkhorn; that she boarded defendant's train at Wahoo and was carried through without change of cars to Elkhorn, where she received the injury through the negligence of defendant, as alleged in her petition. All other allegations of the answer were denied.

A jury was impaneled, when plaintiff called and examined certain witnesses tending to prove the purchase of a

ticket at Wahoo, in Saunders county and on the line of the defendant's road, to Elkhorn, in Douglas county, on the line of the Union Pacific railroad; that she went aboard the train at Wahoo and was transported without change of cars from there to Elkhorn, where the alleged injury occurred.

Among other witnesses called was the station agent at Wahoo, who testified that he was the agent for the Union Pacific Railway Company, hired by the superintendent of the said company, who was also the superintendent of the Omaha & Republican Valley Railroad Company; that the Omaha & Republican Valley railroad, upon the right-of-way of which the depot was located in which he was employed, was operated as a branch of the Union Pacific railroad; that the ticket offered in evidence and attached to the record was the character of ticket sold at the time plaintiff's ticket was purchased, and was known as a local book ticket, which was used as a substitute for card tickets commonly used on railway lines for local travel; that the reason why the ticket of the form given was used, was that card tickets were used only between points where there was considerable travel; that between points where there was but little demand for tickets, the local book ticket was used in its stead. This ticket was in the following form:

UNION PACIFIC RAILWAY.		LOCAL
ONE FIRST CLASS PASSAGE.		
WAHOO		
To _____ <i>Elkhorn</i>		
Via _____		
WHEN OFFICIALLY STAMPED.		
IF THIS TICKET IS SOLD AT A REDUCED RATE IT IS		
VOID AFTER _____ 188		
If no date is written herein, Conductors will honor this as an unlimited Ticket.		
Baggage liability limited to wearing apparel, not exceeding \$100 in value.		
1 3 0 0	(Form L. 100)	
	C. S. Stebbins, General Ticket Agent.	
UNION PACIFIC RY.		
	WAHOO	
	<i>Elkhorn</i>	
To _____		This Check is not good for pas- sage must be filled up to corre- pond with the ticket, and will be voided if not presented at the time it is presented. It is by first Conductor to whom it is presented.
Via _____		
1 3 0 0		

It was shown that all the freight and passenger business of the defendant was reported to the proper auditing officers of the Union Pacific Railway Company, who were also the auditing officers of the defendant; that the eastern terminus of the defendant's road was at Valley, on the Union Pacific railroad in Douglas county, and that the destination (Elkhorn) of plaintiff was on that road a short distance east from Valley. It was also shown that no change of cars was made by passengers going from Wahoo to Elkhorn, but that the car in which the passengers were seated ran over the entire line between the two stations. Plaintiff then sought to prove that she had received the injury complained of at the station at Elkhorn by the negligence of the persons in charge of the train, she being violently thrown from the car upon which she was riding, and from which she was endeavoring to alight, and by which she was injured, and offered to prove all the allegations of her petition in that behalf. To this offer, defendant objected as incompetent, irrelevant, and immaterial, which objection was sustained, and to which ruling plaintiff excepted. The court then directed the jury to return a verdict in favor of defendant, to which plaintiff also excepted.

The verdict having been returned in accordance with the direction of the court, plaintiff presented her motion for a new trial, in which it was alleged that the court erred:

"First—In directing the jury to find for the defendant.

"Second—In refusing to permit plaintiff to prove her case as made by her petition.

"Third—Error of law occurring at the trial.

"Fourth—The verdict is not sustained by sufficient evidence.

"Fifth—The verdict is contrary to law.

"Sixth—The court erred in giving the instructions numbers 'one' and 'two' to the jury."

This motion being overruled, and judgment having been entered in favor of the defendant on the verdict of the jury,

the cause is brought to this court by plaintiff, by proceedings in error.

Two questions are presented for decision :

First—Would the fact that the Union Pacific Railway Company was operating the defendant's road at the time of the accident, if such were the fact, exempt defendant from liability for damages resulting from injuries of the kind alleged to have been sustained by plaintiff?

Second—If not, would the fact that the accident occurred on the line of the Union Pacific railroad and off the line of defendant's road, prevent a recovery against defendant, and render the Union Pacific Railroad Company alone liable, the contract for transportation having been made with defendant, the ticket delivered thereunder being a single local ticket (without coupons) for continuous passage, the transportation being continuous upon the same train or car furnished by defendant at its station on the line of its own road?

We are unable to find any proof in the record as to the capacity in which the Union Pacific Railway Company had possession of the defendant's road—if it had such possession—whether of lessee, owner, or by a traffic arrangement. But for the purpose of this case we do not think it very material as to this, for we are of the opinion that no arrangement or contract could be made which would have the effect of releasing defendant from liability in a case of this kind. It is alleged in the petition and admitted in the answer that defendant is a corporation organized under and by virtue of the laws of this state; and it is alleged in the answer, and perhaps not denied in the reply, that the Union Pacific Railway Company is a corporation organized under and by virtue of the laws of the United States, and hence is not a domestic corporation in the sense of being organized under the laws of this state.

Section 3 of chapter 72 of the Compiled Statutes, in treating of railroad corporations whose lines of road are in this state, is as follows :

"Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the persons of passengers while being transported over its road, except in case where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be by the violation of some express rule or regulation of said road actually brought to his or her notice."

Section 72, *et seq.*, of chapter 16 of the Compiled Statutes, provides a method for the incorporation of railroad companies in this state and confers upon such corporations the right of eminent domain and other privileges therein mentioned, among which are the right to lay out, locate, construct, furnish, maintain, operate, and enjoy, a railroad, and for that purpose the issuance of shares of capital stock of \$100.00 each, which shares shall be regarded as personal property, and shall be subject to sale or transfer in the usual way, etc. The sale and transfer of the shares of stock would not necessarily confer upon another railroad corporation, the owner or holder of such shares, the right to take possession of the road, relieve it from its proper liability to its patrons, and compel them to look to the owner of the capital stock for their compensation for injuries received on its line. It is the general intent and purpose of the constitution and laws of this state that railroad companies, except such as have been chartered by congress, shall, as a condition precedent to the enjoyment of the proper rights and franchises of railroad companies, become organized and incorporated under the laws of this state, and, therefore, subject to the jurisdiction of its courts. These provisions might be successfully evaded or rendered nugatory, were corporations (other than domestic corporations) permitted to buy up the capital stock assume exclusive control and management of the franchises conferred, and at the same time compel persons having legal demands to look to the non-resident corporation for their liquidation. It evidently never was the purpose of the legislature to permit corporations to be organized

under the laws of the state, construct their lines of railroad, and then turn them over to foreign corporations for operation and management, and thus avoid all legal liability growing out of a failure to discharge public duties.

As is substantially said in many of the cases hereinafter cited, the right to organize corporations which shall have the right to exercise the sovereign powers conferred upon railroad companies, is granted only by the laws of our state. A railroad corporation organizing under them does so with the liabilities of a domestic corporation attached. If a railroad company to which the legislature has granted these franchises permits others to use them, the original company must be responsible to the public for the negligence of such persons. It is only by authority derived from the laws of this state that a railroad company can transfer to another the right to use its track by lease or otherwise, and we know of no statute by which the original company can divest itself of responsibility by transferring its corporate powers to other parties, or by leasing its road to them.

It is practically a universal rule in this country that the original incorporated company cannot, in the absence of a special statute authorizing an exemption, divest itself of responsibility for the torts of persons operating its road, by transferring its corporate powers or leasing the road to them. It cannot by its own act absolve itself from its proper obligations without the consent of the legislature. It is liable for injuries to its passengers caused by the negligence of another company which it allows to use its road. (Pierce on Railroads, 283, and cases there cited; see *Balsley v. St. L. R. R. Co.*, 119 Ill. 68; *Singleton v. R. R. Co.*, 70 Ga. 464; *R. R. v. Brown*, 17 Wall. 445; *M. & A. R. R. v. Mayes*, 49 Ga. 355; *Nelson v. Vt. & C. R. R. Co.*, 26 Vt. 717; *O. & M. R. R. v. Dunbar*, 20 Ill. 623.)

It follows that while the ticket might be issued in the name of the operating company, yet a liability would exist as against the corporation constructing and owning the

road, even though the operating company might also be liable.

In *Nelson v. R. R. Co.*, *supra*, Judge Redfield, in writing the opinion of the court, says: "The lessors must, at all events, be held responsible for just what they expected the lessees to do, and possibly for all which they do do, as their general agents. For the public can only look to that corporation to whom they have delegated this portion of public service. Certainly they are not bound to look beyond them, although they may doubtless do so."

Second, it was shown by the evidence that plaintiff's husband went to the station on defendant's road and called for tickets to Elkhorn. Tickets similar to the one hereinbefore copied were handed to him by the agent. While the words "Union Pacific Railway" are printed upon the ticket, and also upon the stub attached thereto, yet there is nothing contained in the ticket which necessarily shows it to be the contract of that company, nor that the contract for carriage was made with it. A ticket is said to be a receipt taken, or voucher showing payment for the passage, rather than a contract, and by its purchase the contract between the passenger and the carrier is said to be consummated. The contract is implied by law, except so far as it is expressed on the face of the ticket. (2 Wood's Railway Law, p. 1394, and cases cited.) The ticket therefore would not render the contract between plaintiff and defendant different from what it would have been had the words referred to not appeared on it. The contract having been to convey plaintiff to Elkhorn from Wahoo, as shown by the testimony above referred to, and a single ticket having been given, it would seem that plaintiff had the right to look to defendant for a fulfillment of such contract. It is perhaps true that where coupon tickets are sold over long lines of connecting roads by the first company acting alone as the agents of those over whose roads the passenger is to travel, the company selling the ticket is liable only for a safe passage over

its line. But such connections do not exist here. For the purpose of the liability of the company selling the ticket, the whole line over which plaintiff was to pass was that of the defendant.

In *Great Western Railway Company v. Blake*, 7 H. & N. (Exch.) 987, Chief Justice Cockburn, in delivering the opinion of the court, says: "If a railroad company chooses to contract to carry passengers not only over their own line, but also over the line of another company, either in whole or in part, the company so contracting incurs all the liability which would attach to them if they contracted solely to carry over their own line."

In that case it was held that the defendant company was liable to the plaintiff for damages resulting from a personal injury caused by an accident on the line of the South Wales Railway Company, and over which the plaintiff was being transported in the same carriage which he entered at Paddington Station, on the Great Western Railway Company's line, and for which he had paid one fare for his conveyance to Milford, on the line of the South Wales Railway Company. The same was held in *Birkett v. Railway Company*, 4 Id. 729. See also *Buxton v. Railway Company*, 3 Q. B. 549; *Thomas v. Railway Company*, 5 Id. 266; *Steller v. C. & N. W. Railway Company*, 49 Wisconsin, 609; *W. St. L. & P. Ry. v. Peyton*, 106 Ills. 534; *Bissell v. Railroad*, 22 N. Y. 258; *Peters v. Rylands*, 20 Pa. St. 497.

Our attention is called to *Hood v. Railroad Company*, 22 Conn. 1, and it is insisted by defendant that the reasoning of Judge Ellsworth in the opinion, conclusively establishes the rule adopted by the learned judge of the district court in his direction to the jury. In that case the plaintiff purchased a ticket from the defendant railway company to Collinsville. The defendant had no road to Collinsville, and passengers were conveyed from a point on its road to Collinsville by stage. A single ticket was sold,

Chollette v. O. & R. V. R. R. Co.

which was exchanged for a ticket given to plaintiff by the conductor on defendant's train, which is as follows:

NEW HAVEN AND NORTHAMPTON
COMPANY.
CONDUCTOR'S TICKET.
*New Haven to Collinsville, by stage
from Farmington.*
O. D. GOODRICH,
Conductor.

Judge Ellsworth in his opinion, referring to the railroad and stage companies, says: "One company receives nothing for the services, or expenditures, or risks, of the other; nor is there a participation in profits; nor a partnership; nor joint obligation; nor joint control. Each attends exclusively to his own appropriate business: the railroad company to the railroad, and the stage company to the stages."

It seems to us that the case at bar must be disposed of on principles differing materially from those applied to that case. While it is true that a single ticket was sold, yet it was known that only a portion of the passage could be made by rail. And doubtless, as stated in the opinion of the learned judge, each company attended exclusively to its own appropriate business: "the railroad company to the railroad, and the stage company to the stages." The railroad made no claim or pretension to carry passengers to Collinsville in its cars, and doubtless the same rule would have been applied had the stage company, instead of running coaches, furnished horses upon which the passenger might ride. But in this case the facts are entirely different. Plaintiff purchased her ticket to Elkhorn. Defendant placed her in a car for passage, which was to and did transport her to her destination without change. When she purchased her ticket and boarded the car at Wahoo, the undertaking was clearly for her transportation therein to the point of destination. The fact that the car would

pass over the track of another company *en route* could make no difference. The same may be said of the citations from Rorer on Railroads, 997, and Wood's Railway Law, 1417, in which it is said, as we have before indicated, where coupon tickets are sold, the company selling the ticket is the agent of the connecting lines over which the coupons attached to the ticket will furnish the passenger transportation.

We hold that the agent by whom the ticket was sold to plaintiff must be treated as the agent of defendant, and that by the sale of the ticket in response to a request for a ticket to Elkhorn, and a conveyance of plaintiff over the road in defendant's train and car without change, procured by the single local ticket, the defendant would be liable for any injury to plaintiff while carrying her over the line designated in her ticket, caused by the negligence of those in charge of the train and car upon which she traveled.

The judgment of the district court is reversed, and the cause is remanded for further proceedings according to law.

REVERSED AND REMANDED.

THE other Judges concur.

WILLIAM H. MCCREERY, APPELLANT, V. JACOB SCHAF-
FER, JULIA SCHAFFER, LUTHERAN ZION CHURCH,
BENJAMIN FREDENBERG, J. M. IRVIN, JOHN H.
POHLMAN, RUSSELL & HOLMES, ADAM WAGNER,
JULIUS GRUBE, HENRY L. YOUNG, JOHN SCHNEI-
DER, JOHN S. STULL, CARSON BANK, FIRST NA-
TIONAL BANK OF BROWNVILLE, NEBRASKA, W. C.
JOLLY, L. G. SWAN, J. S. DEW, J. H. HARDING,
THOMAS J. ALEXANDER, DAVID CAMPBELL, AND
PHENIX INSURANCE CO., APPELLEES.

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26	282
26	173
51	26

[FILED MARCH 20, 1889.]

1. **Homestead: MORTGAGE.** A mortgage on a tract of land, includ-
ing a homestead, executed by a married man without the con-
currence and signature of the wife, is invalid for the purpose of
impairing, disencumbering, or in any manner effecting such
homestead or its appurtenances. (See *Swift v. Dewey*, 20 Neb.
107.)
2. ———: ———. If the husband and wife own a tract of land, a
part of which is claimed as a homestead, and both execute a
mortgage on the whole tract to secure a debt, and the husband
afterward executes a mortgage upon the part not covered by the
homestead, to secure his debt, and judgments are rendered or
filed in the district court against the husband, and the first
mortgagee forecloses, making the other mortgagees and judgment
creditors parties, the second mortgagees and judgment creditors
cannot insist that the homestead be sold; and the decree will di-
rect the part not covered by the homestead to be first sold, and if
the proceeds satisfy the first mortgage, that the homestead be re-
served from sale. The second mortgagees and judgment credit-
ors must rely on the surplus, if any, arising from the sale of the
part not exempt from execution as a homestead.
3. ———: ———: **FORECLOSURE: TAXES.** Where the plaintiff, who
is the assignee of the first mortgagee, purchased the mortgaged
property at tax sale, prior to the transfer of the note and morti-
gage to him, and the mortgage so transferred contains a provi-
sion that in case of default on the part of the mortgagor to pay
the taxes, the mortgagee may pay them and be entitled to legal
interest thereon at the same rate as is provided for on the original

 McCreery v. Schaffer.

debt, the plaintiff, upon the foreclosure of the mortgage and tax lien, will be entitled to interest at twenty per cent upon the amount so paid, prior to the transfer of the note and mortgage to him, under the provisions of section 119 of the revenue law; but upon taxes paid subsequent to the transfer of the mortgage, he will be entitled to interest at the legal rate therein stipulated, no effort being made to obtain title through the tax-sale proceedings.

APPEAL from the district court of Nemaha county.
 Heard below before APPELGET, J.

W. H. Kelligar, and *Stull & Edwards*, for appellants, cited: *Chapman v. Lester*, 12 Kas. 592; *Searl v. Chapman*, 121 Mass. 19, cited in "Thompson on Homesteads;" *Green v. Ramage*, 51 Am. Dec. 458, (18 Ohio, 469); "Relative Rights of Lienors," *Cheesebrough v. Millard*, 7 Am. Dec. 494; *Rector v. Rotton*, 3 Neb. 176; *McHugh v. Smiley*, 17 Id. 626; *Searl v. Chapman*, 121 Mass. 19; "Thompson on Homesteads and Exemptions," sec. 657, p. 658; *Swift v. Dewey et al.*, 20 Neb. 109.

E. W. Thomas, and *G. W. Cornell*, for appellees, cited: *McHugh v. Smiley*, 17 Neb. 623; *Bonorden v. Kriz*, 13 Id. 122; *Showers v. Robinson*, 43 Mich. 502; *Riggs v. Sterling*, (Mich.) 27 N. W. R. 708; *Sherrid v. Southwick*, 43 Mich. 515; *Riggs v. Sterling*, (Mich.) 27 N. W. R. 705; *McClure v. Braniff*, (Iowa,) 39 Id. 172-3; *Eagle Insurance Company v. Pell*, 2 Edw. Ch. 631; *Schoenheit v. Nelson*, 16 Neb. 287; *Lee v. Gregory*, 12 Id. 284; *Colby v. Crocker*, 17 Kas. 527; *LaRue v. Gilbert*, 18 Id. 220; *Sproul v. Atchison Nat. Bk.*, 22 Id. 336; Thompson on Homestead, sec. 663; *Larson v. Butts*, 22 Neb. 370; *Aultman v. Jenkins*, 19 Id. 211; *Swift v. Dewey*, 20 Id. 107.

REESE, CH. J.

Stated in the order of their occurrence, the facts which have given rise to this litigation are as follows:

McCreery v. Schaffer.

On the 4th day of September, 1876, Jacob Schaffer was the owner of the south half of section one, township five north, of range twelve, in Nemaha county; was the head of a family and resided on the south half of the southwest quarter of said section. On that day he executed a mortgage to John Schneider, upon the southwest quarter of the section named, to secure the sum of \$552, due two years thereafter. This mortgage was not signed by Julia Schaffer, his wife. On the 30th of August, 1880, Schaffer and wife joined in the execution of a mortgage upon the whole tract of land, to one Luther Hoadley, to secure the sum of \$600, due in five years thereafter. On the 17th day of January, 1884, Schaffer and wife executed a mortgage upon the same property to Benjamin Fredenburg, to secure the sum of \$800, due in two years. During that year and prior to the execution of the mortgages herein-after referred to, Julia Schaffer became insane, and was confined in the insane hospital, where she now remains. On May 5th, 1884, plaintiff bought the whole of the real estate at tax sale, for the delinquent taxes of 1882, and paid the subsequent taxes, for which he seeks a foreclosure in connection with the foreclosure of his mortgage. On the first day of November, 1884, Schaffer, alone, executed a mortgage on the whole of the property in question, to Russell & Holmes, to secure the sum of \$500, due in one year. On the 2d day of October, 1885, he executed another mortgage, to John H. Pohlman, to secure the sum of \$500, due in one year. On the 8th day of May, 1886, he executed a mortgage on the southwest quarter of the section named, to Henry L. Young, to secure the sum of \$150, due in one year.

Plaintiff is the assignee of the Hoadley mortgage, and instituted this suit for its foreclosure, together with that of his tax lien. Defendants Stull, Alexander, Campbell, Carson National Bank, First National Bank of Brownville, Phenix Insurance Company, and Costello, judgment cred-

itors of Schaffer, are made parties to the action, for the purpose of foreclosing their liens:

The defendants holding liens upon the real estate, whether by mortgages or judgments, filed their answers, in which their several claims were presented. To plaintiff's amended petition, and the various cross-petitions filed by defendants, Schaffer answered that he was a married man, the head of a family, a resident of Nemaha county, and that for seventeen years prior to the commencement of the action he had occupied the southwest quarter of the section referred to as his homestead, and that the same was exempt to him and to his family, as such homestead, as against all the judgments and the mortgages unexecuted by his wife, Julia Schaffer; and asking that the same be declared to be exempt. It was alleged that the mortgages executed by himself alone, in so far as the family homestead was concerned, were void, and the judgments pleaded by a part of the defendants created no lien thereon.

An answer was also filed by the guardian *ad litem* of Julia Schaffer, presenting substantially the same issues.

It is not thought necessary to refer at greater length to the pleadings in the case.

Upon a trial being had, the district court found that plaintiff was entitled to substantially the relief prayed for in his petition, and that he had a first lien on each quarter section for the taxes paid, and on which he was entitled to interest at the rate of ten per cent per annum; that defendant John Schneider, who held the mortgage executed by Schaffer alone on the southwest quarter of the section, and bearing date September 4, 1876, was entitled to a second lien upon the north half of the said southwest quarter; that plaintiff was entitled to a second lien on the southeast quarter, and a third lien on the north half of the southwest quarter; the south half of the southwest quarter being found to be worth two thousand dollars, and to be the homestead of defendant Schaffer. The mortgages signed by Schaffer

alone, and the judgments against him, were declared liens upon all of the land except the south half of the southwest quarter, (the homestead,) and their priorities stated. It was ordered that the mortgages which are liens upon the homestead, should be satisfied, if possible, out of the land included therein but not subject to the homestead exemption; and in case such satisfaction could be made, the homestead should be protected; otherwise it should be sold only for the purpose of satisfying the deficiency.

The defendants holding mortgages signed by Schaffer alone, being dissatisfied with this part of the decree, appeal therefrom. Plaintiff being dissatisfied with that portion of the decree which gives him but ten per cent interest upon the taxes paid, appealed therefrom. Defendant Schaffer makes no objection to the decree, and there is no objection offered by any one to the decree so far as it relates to the Schneider mortgage.

The contention on the part of the appealing defendants seems to be that since Schaffer and wife have legally incumbered their homestead by the mortgages to Hoadley and Fredenburg, the homestead property should be made to bear its equitable portion of the indebtedness secured by such mortgages, and that the decree of the court requiring the other mortgaged property to be exhausted before the homestead could be sold, was erroneous as against the lien holders, who could maintain no right as against the homestead.

The principal question here presented is whether or not the homestead right is such an interest as will entitle its owner to require a mortgagee to exhaust other mortgaged property before subjecting it to the payment of any portion of the debt secured by the mortgage as against the rights of subsequent incumbrancers having no claim upon the homestead property.

By section 17 of chapter 36 of the Compiled Statutes, the homestead right is made such an interest in the real estate

as upon the death of the person from whose property it is selected, it will vest in the survivor for life, and afterward in his or her heirs forever. This interest or title is exempt from sale on execution, and is for the benefit of the family residing upon the land, the right or title to which is vested in the head of such family. It is not subject to alienation by the holder of the legal title, unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife. Such mortgage when signed by the husband or wife alone, the other being alive, is void as to such homestead. (*Bonorden v. Kriz*, 13 Neb. 121.) The claims of appellants seem to be founded upon the principle that where a person has a lien upon two or more funds to secure the payment of a debt, on one of which another person has a similar lien, equity will require the first-mentioned person to satisfy his lien so far as he can from those funds on which the other person has no claim; but we know of no rule which will extend the doctrine to the length of destroying vested rights upon which the second lien-holder has and can have no claim were the first not in existence. It must be conceded that the mortgages executed by Schaffer alone were void as against the homestead, and that the judgments rendered against him created no lien thereon. This being true, such mortgagees and judgment creditors could have no interest in the homestead, no lien thereon, and were entitled to no remedy as against it.

This question was before the supreme court of Kansas in *Colby v. Crocker*, 17 Kas. 527, and it was there held, (Judge Valentine quoting from Judge Story, in his *Equity Jurisprudence*, section 560,) that the equitable rule above stated is "never applied except where it can be done without injustice to the creditor, or other party in interest having title to the double fund, and also without injustice to the common debtor. Nor does it apply in favor of persons who are not common creditors, except upon some special

equity." And in the case referred to, it was held that the subsequent judgment creditor had no such superior equities over the family of the deceased mortgagor, as occupiers of the homestead, as could be enforced either in law or equity, and that the mortgagee of the homestead with other property could not be compelled to exhaust the homestead in payment of his mortgage before resorting to other property belonging to the estate.

The rule in this case was followed by *LaRue v. Gilbert*, 18 Kansas, 220. In that case Brewer, judge, in writing the opinion of the court, says: "The preservation of the homestead is under the policy of our law considered of more importance than the payment of debts. That is what a homestead means—exemption from debts. It is not so much for the debtor as for the debtor's family. And the family of the debtor have, in this respect, equities superior to the creditor. In giving a mortgage on a homestead, the debtor waives this homestead right, but only to the mortgagee, and does not thereby open the door to other creditors or increase their equities."

The same question was before the supreme courts of California, Illinois, and Minnesota, and like decisions were reached. (*McLaughlin v. Hart*, 46 Cal. 638; *Brown v. Cozard*, 68 Ill. 178; *McArthur v. Martin*, 23 Minn. 74.)

A different conclusion seems to have been reached by the supreme courts of other states, cited by appellants, the most of which are cited in Thompson on Homesteads and Exemptions, sections 656-659, but we think the doctrine stated in the authorities referred to in section 660 *et seq.* are more in consonance with the principles of our homestead laws, and especially of the statutory provisions of this state.

A homestead right being a superior right as against all the creditors except those to whom a legal mortgage had been executed upon it, the decree of the district court re-

quiring the satisfaction of such mortgages by the sale of the property included therein and not exempt, was correct.

The mortgage executed to Hoadley, and for the foreclosure of which this suit was instituted, contained the following provision :

"The said first party further agrees that he will pay all taxes and assessments levied upon said real estate, and also upon all personal property owned by him and subject to taxation, within three months after the same shall become delinquent; and if not so paid, the holder of this mortgage may declare the whole sum of money herein secured due and collectible at once, or he may elect to pay such taxes or assessments and be entitled to interest on the same at the rate of ten per cent per annum, and this mortgage shall stand as security for the amount so paid, with interest as above specified."

The note and mortgage were assigned to plaintiff, on the 24th day of June, 1884. On the 5th day of May preceding, the southeast quarter of said section one was sold by the county treasurer to plaintiff, for \$29.33, being the taxes of 1882, which were then delinquent, and on the same day he paid the sum of \$20.70, the taxes of 1883, making a total of \$50.03. On the same day he purchased at tax sale the southwest quarter of said section, paying therefor the sum of \$29.69, the taxes for 1882, then delinquent, and also the taxes of 1883, amounting to \$20.70, making a total of \$50.39; the whole amount of said payments being \$100.42. He paid the taxes which subsequently matured as they became due, but all of which were paid after the assignment of the note and mortgage to him. By the decree of the district court, he was allowed interest upon the whole of the taxes paid at the rate of ten per cent per annum from date of payment, instead of twenty per cent as provided by section 119 of the revenue law of the state. This ruling is assigned for error by plaintiff. It is contended by the appellee that it is shown by the record that plaintiff was

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the owner of the mortgage at the time of the purchase of the land at tax sale, but we are unable to find any proof of that fact. As is shown by the bill of exceptions, it was stipulated upon the trial that the note and mortgage were assigned to plaintiff on June 24, 1884. The county treasurer's certificates of tax sale are dated the 5th day of May, 1884, and this is all the evidence we are able to find upon that subject. We think the decision of the district court, that plaintiff would be entitled to but ten per cent upon the taxes paid after the assignment to him of the note and mortgage, was correct, but as it appears that the \$100.42 was paid prior to the transfer of the note and mortgage, plaintiff would be entitled to interest thereon for two years from the date of payment at the rate of twenty per cent per annum. The decree will therefore be modified to the extent of allowing plaintiff the sum of \$20.08 additional interest on the \$100.42 for two years commencing May 5th 1884. As thus modified, the decree will be affirmed.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

FRANK RAWLINS ET AL., PLAINTIFFS IN ERROR, V.
T. P. KENNARD & SON, DEFENDANTS IN ERROR.

[FILED MARCH 20, 1889.]

1. **Chattel Mortgage.** A description of property in a chattel mortgage is sufficient, where it will enable a third person, aided by inquiries which the instrument itself suggests, to identify the property.
2. ———: **PRIORITY OF LIENS.** One H. executed a chattel mortgage upon a span of mules to a machine company in July, 1885, in which the mules were described as "Two brown mules, one

26	181
41	90
26	181
158	330

four years old, the other five years old; weight about 950 pounds each."

This mortgage was duly filed for record. On the 14th of August, 1885, H. executed a chattel mortgage to K. & Son, on two mules described as follows: "One bay horse mule, five years old; one bay mare mule, five years old." This mortgage was afterward duly filed for record. K. & Son had actual notice of the existence of the mortgage to the machine company upon the mules described in its mortgage, and interrogated H. as to the number of mules possessed by him; and he informed them that he possessed two spans of mules, and that the mortgage to K. & Son was upon a different span from that mortgaged to the machine company. It appeared from the testimony that H. possessed but one span of mules. *Held*, That the right of the machine company was superior to that of K. & Son.

ERROR to the district court for Lancaster county. Tried below before HAYWARD, J.

Cornish & Tibbets, for plaintiff in error, cited: *Harris v. Kennedy*, 4 N. W. R. 651; *Wiley v. Shars*, 21 Neb. 712; *Jones on Chattel Mortgages*, secs. 644, 645, 662.

Harwood, Ames & Kelly, for defendants in error, cited: *Jones on Mortgages*, 3d Ed., vol. 2, sec. 971; *Shaver v. Williams*, 87 Ill. 469; *Banta v. Garmo*, 1 Sanford Ch. (N. Y.) 383; *Anglade v. St. Avit*, 67 Mo. 434.

MAXWELL, J.

This is an action of replevin brought by the defendants in error against the plaintiff in error to recover the possession of a span of mules. On the trial of the cause in the court below, a verdict was rendered in favor of the defendants in error, and a motion for a new trial having been overruled, judgment was entered on the verdict.

The testimony shows that on the 30th day of July, 1885, one G. E. Harper executed a chattel mortgage upon the following described property:

"One Belleville 32 in. thresher, No. 4281; one twelve-

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horse Woodbury Power, No. 167, and equalizer, made by the Harrison Machine works; two brown mules, one four years old, the other five years old, weight about 950 pounds each; one black horse four years old, one ear off, weight about 950 pounds; one bay horse, nine years old, weight about 1,100 pounds.

There is a recital in the mortgage, of possession of the mortgagor, as follows:

"The above described chattels are now in my possession, are owned by me, and free from all incumbrances in all respects."

The above mortgage was given to secure the sum of \$688, and was duly filed in the office of the county clerk on August 1, 1885, and is numbered 15578.

On the 14th of August, 1885, G. E. Harper executed a chattel mortgage to T. P. Kennard & Son, upon the following described property:

"One bay horse mule, five years old; one bay mare mule five years old; one gray mare five years old; one bay horse three years old; two sets of double harness; one Studebaker wagon, and one other two-horse wagon."

This mortgage was given to secure the sum of \$130. It was duly filed for record October 26, 1886, and is numbered 15773.

The testimony shows that the defendant had personal as well as constructive notice of the mortgage of the plaintiff in error, before the execution of the mortgage by Harper to them. Mr. Alva Kennard, one of the defendants in error, testifies:

Q. What did you ask Mr. Harper in regard to the mules?

A. He owed the firm something like \$160; he came in and wanted to pay part of the money and extend the balance; he told me how much he wanted to pay; I figured it up. I kept a mortgage record at that time, and I turned to the mortgage record to see if he had mortgaged

the property to some one else besides me; I found he had mortgaged a pair of brown mules to the Harrison Machine works. I asked him how many spans of mules he had, and he said two, a span of brown mules, which were mortgaged to them, and a span of bay mules. I said, Is that the only two teams you have got? He said, No; I have three or four teams of horses.

Q. Then you did not ask him if these were not the mules on which the Harrison Machine Works had a mortgage?

A. I did not.

Q. Did you see the Harrison Machine Works' mortgage?

A. No, sir, I did not see it.

Q. How did you find out they had a mortgage?

A. I told you that I kept a record in my office.

Q. What did you take it from?

A. I paid a man \$6 a month to furnish me a copy every morning — a copy of the mortgages complete from the day before.

The only controversy in this case is between two mortgagees of the same property. The testimony shows that Harper possessed but one span of mules at the time that he executed the mortgage to the defendants in error. These mules were about five years of age, and weighed from 900 to 1,000 pounds each, and were in the possession of Harper at his residence in Lancaster county. There is some controversy in regard to the color of the mules, a number of witnesses testifying that they were a bay color, while others testify that they were brown. There is also testimony tending to show that the color changed somewhat with the season of the year. The question presented is, Was the description in the mortgage sufficient to put parties upon inquiry? In *Jordan v. Hamilton County Bank*, 11 Neb. 499, the description was as follows: "Two mules, one bay and one brown, aged eight years old. One mare, bay, eight years old. One bay horse, five years old. One black

mare, five years old. One lumber wagon. One double harness. Nine acres of growing wheat, situated on southwest quarter of sec. 35, town 12, range 6." Lake, J., says: "It is contended by counsel for the defendant in error that this description is void for uncertainty. We think otherwise. The color and age of all the animals is definitely given. The wagon is described as a 'lumber' one, a term generally applied to an ordinary double wagon used by farmers. The harness as a 'double' one, that is, designed for a team of two animals. The nine acres of wheat was then growing. According to the mortgage, this property was all then upon a certain tract of land described by government subdivision, in Hamilton county, Nebraska, and we think that a person of average intelligence would have had no serious difficulty in finding and pointing it out, if there. Besides, if necessary, in order to distinguish any portion of it from other property of like description on the land, parol evidence was admissible for that purpose. (*Bell v. Prewitt*, 62 Ill. 361.)"

Jordan v. Hamilton County Bank is cited with approval in *Peters v. Parsons*, 18 Neb. 193, where, after copying the description of the property in dispute, as "one bay horse eight years old, weight about 1,200," of which the mortgagor was possessed, it is said: "This certainly is sufficient to put a purchaser on inquiry, particularly where the mortgagor appears to have possessed but one horse of that color, and it is shown that Glazier was actually using the horse in question for some time before and at the time he traded the same to the plaintiff in error." In *Price v. McComas*, 21 Neb. 198, the court says: "The description should be such as to enable third parties to identify the property, aided by inquiries which the mortgage itself indicates and directs. (*Elder v. Miller*, 60 Me. 118; *Skowhegan Bank v. Farrar*, 46 Id. 293; *Chapin v. Cram*, 40 Id. 561; *Herman on Chat. Mort.* 574.) The general rule is that the description is sufficient if it will

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enable a third person, aided by inquiries which the instrument itself suggests, to identify the property. (Jones, Chattel Mortgages, sec. 54; *Tolbert v. Horton*, 31 Minn. 518; *Tolbert v. Horton*, 33 Id. 104; *Smith v. McLean*, 24 Iowa, 322; *Yant v. Harvey*, 55 Id. 421. See also cases cited in American and Eng. Encyc. of Law, 180 and 181.) The description of the mules evidently was sufficient to apprise the defendants in error of the property mortgaged. Had they followed this notice up they would have found that Harper was possessed of but one span of mules, upon which he had given the mortgage to the plaintiff in error. The defendants in error, however, made no effort to ascertain the exact facts, but relied upon the statement of Harper, that he possessed another span of mules. This statement is shown to have been untrue, and Harper did not execute a mortgage to the defendants in error on a different span of mules from that mortgaged to the plaintiffs in error. As between the mortgagees, therefore, the defendants in error must sustain the loss. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

The other Judges concur.

GEORGE W. BURTON, PLAINTIFF IN ERROR, v. DENNIS
W. CAVE, DEFENDANT IN ERROR.

[FILED APRIL 3, 1889.]

1. **Execution: FAILURE OF OFFICER TO SELL.** In an action against a sheriff for failing to sell certain personal property levied upon under an execution as that of the defendant, but not sold, the testimony showed that the property was claimed by a

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third party, who brought an action of replevin to recover the same, but failed to give the requisite undertaking; that upon the return of the property to the officer, the weight of testimony tended to show that the plaintiff's attorney instructed him not to sell until the question of title was determined; that in the meantime, the return-day having passed, the plaintiff's attorney instructed the officer to return the execution and procure another one, which was done, and again levied upon the property in dispute, when the debtor filed an inventory of all his property and claimed that levied upon as exempt. The property was thereupon released. *Held*, Upon the facts proved, that the officer was not liable.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

John Dawson, for plaintiff in error.

No appearance for defendant in error.

MAXWELL, J.

In April, 1883, the plaintiff recovered a judgment before a justice of the peace against one Patrick Manning for the sum of \$125.80. An execution was duly issued thereon which was delivered to a deputy of the defendant, (the defendant being the sheriff of Harlan county,) and was levied upon five sewing machines of the appraised value of \$75. These machines were afterward taken on an order of replevin in an action brought by Bridget Manning, the mother of Patrick Manning, but as she failed to give the undertaking required by law the property was returned to the defendant. The property upon being returned to the defendant was not sold under the execution, and there is a dispute in the testimony as to the cause of the failure to sell. The defendant contends, as also does his deputy, and so testifies, that the plaintiff's attorney instructed them not to sell the property until the question of the title to the same was determined, and that in the meantime the return day of the execution having passed, they were instructed by him

to return the execution; that thereupon they did so, and that a second execution was issued and the property again levied upon, when Manning filed an inventory under oath of all his property, and claimed the same as exempt; and that thereupon the property was released from the levy. These facts are nearly all admitted by the plaintiff's attorney, although he testifies that he insisted upon a sale.

This action is brought against the defendant for a failure to sell the sewing machines in controversy under the execution. The proof fails to show that the first execution was unlawfully returned without a sale having been made, or that the property released from the levy was not exempt from sale upon execution. All presumptions are in favor of the action of the officer, unless the acts done appear to be unlawful. This is not shown. The jury returned a verdict in favor of the defendant, and a motion for a new trial having been overruled, judgment was entered on the verdict. The evidence fully sustains the verdict—in fact, it is the only one the jury would have been justified in rendering. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

CHICAGO, BURLINGTON & QUINCY R. R. Co., PLAINTIFF
IN ERROR, V. ROBERT JAMES, DEFENDANT IN ER-
ROR.

[FILED MARCH 20, 1889.]

1. **Railroads: FENCING: CONSTRUCTION OF STATUTE.** Section 1 of the act of 1867 requires every railroad company in the state, within six months after its line of railroad, or any part thereof, is open, to erect and thereafter maintain fences on the sides of said railway, or the part thereof open for use, suitably and am-

96	188
26	194
26	198
50	645

ply sufficient to prevent cattle, horses, sheep, and hogs, from getting on the track, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, etc.

2. ———: ———: ———. The provisions of section 18, chapter 2, Compiled Statutes, defining a lawful fence, apply alone to the inclosing of *lands*, and do not apply to the fencing of a railway. That matter is governed by section 1, article 1, chapter 72, Compiled Statutes.

ERROR to the district court for York county. Tried below before NORVAL, J.

George B. France, and *Marquett & Deweese*, for plaintiff in error.

Montgomery & Giffin, for defendant in error.

MAXWELL, J.

The defendant in error is the owner of a farm through which the track of the railway belonging to the plaintiff in error is constructed. The trains of the plaintiff in error ran over and killed certain hogs of the defendant in error. The defendant in error thereupon served notice on the plaintiff in error of the destruction of said hogs, and demanded payment therefor. He also served an affidavit setting forth the loss, as required by the statute. The plaintiff in error, however, neglected to pay said loss, whereupon the defendant in error brought an action to recover the value of the hogs destroyed, and on the trial in the court below recovered a verdict and judgment.

The testimony shows that the plaintiff in error had fenced its track at the place where the hogs were killed, with posts and barbed wire, the posts being about sixteen feet apart and four barbed wires being placed thereon, at proper intervals, the one nearest the ground being about eighteen inches therefrom. The plaintiff in error contends that the fence at that point was a lawful one, and

that, therefore, it is not liable. The controlling question is, What constitutes a suitable and amply sufficient railway fence?

Section 1, article 1, chapter 72, Compiled Statutes, provides, "That every railroad corporation whose lines of road, or any part thereof, is open for use, shall, within six months after the passage of this act, and every railroad company formed, or to be formed, but whose lines are not now open for use, shall, within six months after the lines of such railroad or any part thereof are open, erect and thereafter maintain fences on the sides of their said railroad, or the part thereof so open for use, suitably and amply sufficient to prevent cattle, horses, sheep, and hogs, from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, with opens, or gates, or bars, at all the farm crossings of such railroads, for the use of the proprietors of the lands adjoining such railroad, and shall also construct where the same has not already been done, and hereafter maintain at all road-crossings now existing, or hereafter established, cattle-guards suitable and sufficient to prevent cattle, horses, sheep, and hogs, from getting on to such railroad, and so long as such fences and cattle-guards shall be made after the time hereinbefore prescribed for making the same shall have elapsed, and when such fences and guards, or any part thereof, is not in sufficiently good repair to accomplish the objects for which the same is herein prescribed, is intended, such railroad corporation and its agents shall be liable for any and all damages which shall be done by the agents, engines, or trains, of any such corporation, or by the locomotives, engines, or trains, of any other corporations permitted and running over or upon their said railroad, to any cattle, horses, sheep, or hogs thereon; and when such fences and guards have been fully and duly made, and shall be kept in good and sufficient repair, such railroad corporation shall not be liable for any such dam-

ages, unless negligently or willfully done: *Provided, however,* That any person, company, or corporation, owning land adjoining the right of way of any railroad company in this state, and not within the limits of any town, village, or city, and intending to inclose his or their land, or any part thereof that adjoins such right of way or railroad, with a fence, such person, or the secretary of such company or corporation, by direction thereof, may notify in writing such railroad company of such intention, and request such railroad company to build a lawful fence as described in this section, on the line between their railroad and the land intended to be inclosed. Such notice shall definitely specify two points on such line between which points such fence is requested to be erected, and describe the field intended to be enclosed. The railroad company shall, within six months after receiving such notice, cause to be erected the fence required by such notice, and in case of a failure so to do, the party so giving notice as aforesaid may cause such fence to be erected at a reasonable cost and collect the amount thereof from the railroad company so neglecting to erect the fence."

The attorneys for the railway company contend that all that is required is a lawful fence as defined by sec. 18, art. 2, chap. 2, Compiled Statutes, which is as follows: "Such structures as shall be used for a fence, *to inclose lands*, shall be as follows:

"I. A rail fence shall consist of at least six rails, said rails to be secured by stakes at the end of each panel, well set in the ground, with a rider upon said stakes. A board fence shall consist of not less than three boards of at least five inches in width and one inch thick, said boards to be well secured to posts, the posts to be not more than eight feet apart. A rail and post fence shall consist of at least three rails, well secured at each end to posts, and posts to be not more than ten feet apart. A pole and post fence shall consist of not less than four poles,

to be well secured to posts, said posts to be not more than seven feet apart. A wire fence shall consist of at least four wires, of a size not less than number nine fencing wire, to be well secured to posts, said posts to be at no greater distance than one rod from each other; and there shall be placed between every two of said posts one stake or post to which the wire shall be attached.

"II. The fences described in the preceding section shall be at least four and one-half feet in height, and in the construction of said fences the spaces between the boards, rails, poles, and wires, herein provided for, shall not exceed one foot each, measuring from the top.

"III. A hedge fence of osage orange shall consist of at least one row of plants, said plants not to be more than eight inches apart at the surface of the ground, and said hedge shall be such as fence-viewers shall decide a lawful fence. A hedge fence of willow or other trees used for that purpose, shall consist of at least one row of such trees, standing not more than fifteen inches apart at the surface of the ground, and at least two and one-half inches in diameter, and at least six feet in height.

"IV. Fence known as 'Warner's patent,' shall be at least four and a half feet in height, and consist of not less than five boards, said boards to be at least five inches wide, and one inch thick."

It will be observed that the fences described as lawful fences in the section last copied, are such as may be used to inclose lands. It is very evident that this section was not intended to apply to railways. The fence on each side of a railway must be such as is "suitably and amply sufficient to prevent cattle, horses, sheep, and hogs, from getting on the railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages," etc. The act requiring railroads to fence their tracks within six months after the railroad or any part thereof is open for use, was passed in 1867, and has been in force

without material modification from that time until the present. This is a burden which the statute casts upon each railroad company within the state. The statute evidently has two objects: First, to prevent danger to the passengers over the railway and the employes of the company by requiring such a fence on both sides of the railway, as will prevent cattle, horses, sheep, and hogs, from getting on the track and thus endangering the lives or limbs of passengers and employes by throwing the trains from the track; and Second, as a protection to each land owner through whose land the road has been constructed. It is well known that in the early history of the construction of railways in some of the states of this country, there was no statute regulation in regard to the building of fences along the lines of railways; hence, in such states, where stock of the description named got upon the track and was killed or injured, or caused loss by throwing the cars from the track, a large amount of litigation sprung up, involving the rights of the respective parties, which not unfrequently resulted in great injustice. To guard against this result, before any considerable number of miles of railway had been built in the state, the legislature passed the act in question. The railway in this case is shown by the testimony to have been open for use for more than ten years before the cause of action accrued, and the fence inclosing the same is shown to have been wholly inadequate for the purpose of excluding hogs from the track. The judgment of the district court is clearly right, and is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

THE CHICAGO, BURLINGTON & QUINCY R. R. Co.,
PLAINTIFF IN ERROR, V. ROBERT JAMES, DEFEND-
ANT IN ERROR.

[FILED MARCH 20, 1889.]

MAXWELL, J.

The facts in this case are substantially the same as in the case of the *Chicago, Burlington & Quincy R. R. Co. v. James*, just decided, and the same judgment will be entered.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

P. M. GILBERT, PLAINTIFF IN ERROR, V. THE MERRIAM
& ROBERSON SADDLERY COMPANY, DEFENDANT IN
ERROR.

[FILED APRIL 3, 1889.]

1. **Instructions to Jury.** An instruction by which it is sought to cover the whole case, and upon which, if met by the evidence, the jury is instructed to find in a certain way, should include all the elements necessarily involved in the case and within the evidence. (*Runge v. Brown*, 23 Neb. 817.)
2. ———. The third instruction asked by the defendant correctly expresses the law arising upon the evidence in the case, and not contained in any instruction in the case, and ought to have been given.
3. **Evidence: ACCOUNT BOOKS.** Books of account are receivable in evidence only when they contain charges by one party against the other, and then only under the circumstances and verified in the manner provided by statute. (*Van Every v. Fitzgerald*, 21 Neb. 36.)

26b	194
43	403
26b	194
46	118

26b	194
56	393

26b	194
61	585

ERROR to the district court for Richardson county. Tried below before BROADY, J.

Frank Martin, for plaintiff in error.

C. Gillespie, and *E. W. Thomas*, for defendant in error.

COBB, J.

This action was brought in the district court of Richardson county, by the Merriam & Roberson Saddlery Company, against one P. M. Gilbert, on an account for saddlery goods, saddlery hardware and findings, alleged to have been sold by the plaintiff, a wholesale dealer in Kansas City, Missouri, to the defendant, a retail dealer at the town of Oxford, Kansas.

The petition is in the usual proper form, setting out the corporate capacity of the plaintiff and the account against the defendant for goods, wares, and merchandise, sold and delivered, and claiming a balance due on the account amounting to the sum of \$602.44, together with the plaintiff's bill of particulars.

The defendant's answer is a general denial.

There was a trial to a jury, with a verdict and judgment for the plaintiff. The defendant's motion for a new trial having been overruled, he brings the cause to this court on the following assignments of error:

I. The court erred in giving the second and third instructions on its own motion.

II. In refusing to give the first, second, and third, instructions asked by defendant.

III. In admitting in evidence the cash book and the entries therein.

IV. In requiring the defendant to produce said book, and deliver it to the plaintiff.

V. In admitting in evidence the entries in said book on pages 44 to 71 inclusive, and on page 379.

VI. In admitting in evidence the entries in said book not in the handwriting of defendant nor made by his authority.

VII. The verdict is not sustained by sufficient evidence, and is against the evidence.

VIII. In overruling the objections of the defendant to testimony offered by the plaintiff, as shown by the bill of exceptions.

IX. In overruling the motion for a new trial.

It appears from the evidence in the bill of exceptions that the defendant Gilbert, at that time at Oxford, Kansas, in the latter part of October, 1885, bought a small saddlery and harness business, and continued the same, in his own name, at Oxford. In the months of October, November, and December, of said year, he made small purchases of saddlery and harness goods of the plaintiff at its store in Kansas City, which were shipped by express to the store of defendant at Oxford, as to which there is no dispute. Gilbert himself was not a saddler nor harness maker, nor did he have any special knowledge of the trade. At the commencement he had in his employ a saddler and harness maker named Riley, but shortly after going into the business he was discharged, and one W. N. Hart, a saddler and harness maker, was employed by Gilbert. The evidence is sharply conflicting as to what this man was hired to do, especially in the absence of Gilbert. Early in January, 1886, Gilbert having business at Stella and Falls City, Nebraska, left his home and business at Oxford and came to Nebraska. It may be assumed as true and uncontradicted that he left his shop and business in the charge of Hart. Gilbert states in his testimony that Hart "was a harness maker," and that he hired "him to do common work in the shop," and repeatedly states that "Hart only had the authority of a journeyman saddler and harness maker; that his chief duties were to repair and do all jobs of repairing which might come in, but that in the absence

of the owner he had authority to sell such articles as were kept for sale, and to receive the money therefor." He repeatedly states that this was the extent of Hart's authority, and particularly that he had no authority to buy nor to order the purchase of goods. He also testifies that soon after starting the business he wrote to the plaintiff a letter, in which he expressly warned it not to fill any order for goods without his name accompanying the order. This letter, dated October 26, 1885, was introduced in evidence by the plaintiff, and appears in the bill of exceptions. It contains the following paragraph: "May send you another small order soon, but fill no order without my name accompanying it." He further testified that at the time he left Oxford on his way to Nebraska, in 1886, he passed through Kansas City and stopped at the store of the plaintiff; that in conversation with Frank Merriam, president of the company, Merriam asked him whether, in case the man whom he had left at his shop at Oxford might need something while he, Gilbert, was gone, and make an order on plaintiff for it, the order should be filled; that he replied as follows: "I answered, 'No; I don't allow anybody to order goods unless it comes from me,' and said: 'When I come back—I don't know how long I shall be gone—I will come through Kansas City, and I may need some spring goods; but I have got all the common goods I want. I will only want a small order, and will buy as I come back through here.'" On the contrary, Frank Merriam, president of the plaintiff company, when on the stand as a witness, testified that the second time he saw defendant, Gilbert, was in the month of December or January, 1885 or 1886. He said he wanted some more goods, and wanted Roberson to let him know when he would be there, and said if he was not at Oxford when Roberson arrived there, that his man Hart would give Roberson an order for goods.

The deposition of W. N. Hart, taken at Dallas, Texas,

was read in evidence, in which he testified that Gilbert placed him in charge of his saddlery business at Oxford; that along about the last of December, 1885, or first of January, 1886, Gilbert started to go to Nebraska, but on account of a severe snow storm, was detained about three days; that on the evening when he was ready to leave the second time he told him: "'Hart, I am going up to Nebraska on business. Don't know when I will be back. Roberson, the traveling man, for Merriam's Saddlery Company, will be here on the 27th of January. You buy such goods as you may need from him. I don't know anything about the business. You know what you need better than I do;'" and if I needed anything I did not buy from Roberson, then I should send on to the house of the Merriam & Roberson Company after it and they would send it to me. He said he was going through Kansas City on his way to Nebraska, and that he would tell them, Merriam and Roberson, that I would need some goods, and for them to let me have them;" that he told him this in the store room at Oxford the evening that he left, in the presence of deponent's brother, Harry E. Hart, and two other young men whose names are not remembered, but thought one of them was Tom Brady and the other Ed Gilbert. Deponent described with particularity the place in the store where Gilbert was then sitting, and where deponent was standing, and where the brother, H. E. Hart, was standing, when the conversation was had wherein, as the witness expressed it, Gilbert gave him the authority to purchase goods from Merriam-Roberson's Saddlery Company. He also described the manner in which Gilbert, as he was taking his leave and after he had got out of the store, came back and said to witness, "I want you to take charge of this business, and run it the best you know how." Witness asked him when he would be back. He replied that he did not know when he would be back. The witness also stated that on or about January 28, 1886, Roberson, the

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traveling man of the plaintiff, arrived at the store at Oxford, and that witness, pursuant to the orders of Gilbert, bought by sample from him thirteen or fourteen hundred dollars' worth of goods, and made three other small orders for goods, and gave Roberson another order about March 13, 1886; that all the goods ordered by him for Gilbert were sent to the store as ordered; and that P. M. Gilbert returned to Oxford and was in the store after all these goods were received and were opened and arranged by deponent; that Gilbert looked around the store and said to deponent, "Well, you have got a nice store here now. I would not be ashamed for my friend Filley to see it now. I am glad you have the taste to arrange goods so well, etc.;" that Gilbert seemed pleased with the stock of goods deponent had purchased from the Merriam-Roberson Saddlery Company, and made no objection at all to his having bought the goods.

The deposition of H. E. Hart, taken at Wichita, Kas., was also read in evidence at the trial, in which he stated that about the middle of January, 1886, Tom Brady and Ed Gilbert being present, the defendant, Gilbert, told the brother of deponent to "buy the goods whatever he may need in the business, and to run it the best he knew how;" that this conversation occurred in the store-room.

All this evidence of Merriam and the two Harts is expressly contradicted and denied by Gilbert, and from the bill of particulars attached to the plaintiff's petition, it appears that a bill of goods amounting to \$159.01 was purchased January 13, 1886, and one of \$2.25 on the 15th of same month. There does not appear to have been any order made for the bill of January 15, but there is one dated January 14, 1886, for the gig saddle sent by express on the 15th, and this at a time when all testimony agrees that Gilbert was not at Oxford, and was gone nearly half a month before the time of making the purchase, according to Hart's deposition.

It further appears, from Gilbert's testimony, that about the first day of March he made a hurried trip from Nebraska to Arkansas City, Kas., and on his way, (either to or from, which does not appear,) he stopped at his home at Oxford, and there learned for the first time that goods had been ordered by Hart, and brought into his shop or store during his absence. Gilbert states that immediately upon learning the fact, he informed Merriam & Roberson that the goods had been ordered without his authority; that they were subject to their order, and that he was ready to ship the same back to them; and that he immediately ordered Hart not to sell or dispose of any of the goods. The letter written by Gilbert to plaintiff, March 4, 1886, introduced by plaintiff, and attached to the bill of exceptions, as a part of exhibit E, which is presented in full, is doubtless what Gilbert refers to as information to Merriam & Roberson:

"OXFORD, March 4, 1886:

"*Messrs. Merriam & Roberson, Kansas City:* I this day returned home on a hurried trip; am obliged to return to Nebraska on a short trip again. I will inclose you a draft for \$100 on my old account. Will see to sending balance soon as I return.

"I am much surprised to find so many goods ordered by Mr. Hart. I gave no such orders; and amongst them are many things not salable in this market; other things overstocked. What shall be done? Shall they be shipped back, or held and paid for when sold? His last order for collars, which he says he sent you, was needed, and I this day ordered them of an Atchison firm, as you did not send them. I will try to call and see you as I return again from Nebraska. I will pay without complaint all that I buy, but do not wish to pay for what others buy, without orders, on my credit; but should I need the goods, will pay as above stated, if satisfactory. Yours, etc.,

"P. M. GILBERT."

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It seems that soon after writing the above letter, probably on the day of its date, Gilbert again left Oxford, to go to Richardson county, Nebraska, where he remained about twenty days before returning to Oxford. Very shortly after his return, Hart left his employment and left the place, or, as Gilbert termed it, "he had skipped out." Gilbert then carefully selected the goods which had been shipped to the store by the plaintiff, and shipped them back to the company at Kansas City. These, with the exception of the contents of one box which was claimed to have been lost in transit, were credited to Gilbert, but at a rate of discount not proven in evidence; and it is the difference between the price of these goods as sold and the amount credited Gilbert for the goods returned, that constitutes the amount of the matter in controversy between the parties. Gilbert seeks to justify himself in going away and leaving Hart in possession of his shop, after he had ascertained that he had been disobeying orders and making purchases without authority, on the ground, and giving as a reason therefor, that he had important and pressing business at Falls City, Neb., which demanded his immediate return to that place. An examination of all the evidence in the case, as well as that briefly summarized above, shows that the evidence is sharply conflicting. Had the jury implicitly believed the testimony of Gilbert, they could not have found for plaintiff. But disbelieving some portion of his statements as to important facts, and believing the contrary statements of Merriam and the Harts, which they evidently did, they were possibly justified in coming to the conclusion which they did in their verdict.

These goods were returned by Gilbert and received by plaintiff, no doubt in pursuance of some contract, agreement, or understanding, between them; but unfortunately the evidence as to what that agreement was is absolutely wanting on the part of Gilbert, and far from satisfactory on the part of plaintiff; and it is worthy of remark that

while plaintiff contends that the original sale of these goods was authorized and regular, it does not appear that there was the least objection raised to receiving them back upon Gilbert's claim that they were shipped to him not only without his authority, but against his express orders communicated to plaintiff.

The following is the testimony of Merriam as to this part of the case :

Q. Did you see Gilbert at any other time after this matter of Hart's account came into dispute between you ?

A. Yes.

Q. What did he say when you saw him ?

A. He came into the store and said he had shipped some goods back to us.

Q. How much did he claim in value he had shipped back ?

A. I don't remember.

Q. What was said about paying you for the balance of the goods—the unpaid balance? Did you exchange accounts?

A. Yes; he sent the goods back to us, and we were to give him credit for them when received.

Q. You had that verbal understanding with him in your store?

A. Yes.

Q. You had been exchanging accounts when you got this complaint, March 4, between you and Hart? Did he agree your account was correct, the account you submitted to him ?

A. Yes; there was no objection found as to the accounts that I know of.

Q. He agreed to pay the balance; do you remember how much the balance was?

A. The balance, after the goods were returned was something over \$600.

Q. This he agreed to pay?

A. Yes.

Q. Who was there at the time he agreed to pay that—who else besides you and Gilbert?

A. I don't remember.

Q. When was that; what time?

A. I think it was in April, 1886.

Q. Has he ever paid you that \$600 he agreed to pay?

A. No, sir.

Q. Is that the amount expressed in this account?

A. Yes; about that.

Q. State if there is any other fact you know in connection with this matter, any conversation had with Gilbert. The amount here expressed is \$643.44.

A. The amount there is correct, I presume; I don't remember positively; I could tell by looking at the bill. [Examining the bill.] Yes; that is right. There is the balance; there is the memorandum of credits and of total indebtedness, leaving a balance of \$643.44.

Q. That was the agreed balance between you?

A. Yes.

Again, on cross-examination.

Q. You have examined these depositions?

A. Yes.

Q. State whether or not there is any such statement in either of these depositions as you have made on the stand?

A. No, sir; that statement in reference to settlement of account—there is nothing in this, and if I have made a statement that Gilbert said he would pay the balance in cash after the goods were returned, I wish to make a correction. I got that impression, and always understood that when the goods were returned the balance was to be paid to us. If I made that statement I wish to correct it.

Q. Didn't you swear a while ago that Gilbert and yourself in your store in Kansas City had a positive—absolutely positive—settlement and understanding that he was to pay the whole of that bill—six hundred and some odd dollars

—and that he promised and agreed to pay that amount of money?

A. That is what I want to say.

Q. At that time, did you not say that?

A. If I said that I want to correct the impression.

Q. Didn't I ask you if you was as certain of that as of anything else, and you answered, yes, you were?

A. If I said so you could tell; and I want to say my impression was, the understanding always, when the goods were returned we were to give Gilbert credit for them, and he was to pay the balance.

Q. Then you wish the jury to understand as a matter of fact, there was no such agreement between you, as you thought a moment ago that there was?

A. I wish them to understand when the goods were returned they were to be credited, and the balance to be paid. I don't wish to say that Gilbert said he would pay the balance in dollars and cents; that was the impression that the members of our firm had, that the balance was to be paid.

Q. Didn't you read all this list to Gilbert when you received them?

A. Certainly.

Q. Don't you know what he claimed in this list?

A. I knew what he claimed.

Q. Where did you get the impression of his agreeing positively and absolutely that he would pay the bill, and not by your impression?

A. Because I thought we could hold him for them.

But the first assignment of error, as has been seen, is the giving of the second and third instructions of the court on its own motion:

"2. If you find from the evidence that the goods described in the petition were sent by the plaintiff from Kansas City, consigned to defendant at Oxford, Kansas, and that the goods, according to such consignment, reached and were

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placed into the store of defendant at Oxford, it will be for you to consider other matters contested in the proofs, among which is the question as to whether such shipments were by defendant's authority. If you find that defendant in person authorized the shipments, that would be a sufficient authority; but if you fail to find that defendant in person authorized the shipments, the next step on the question of authority is to determine whether he did so by agent. There is no evidence offered to show that any person other than W. N. Hart had authority as agent to authorize the said shipments. If you find that W. N. Hart was defendant's agent authorized to order the said goods, and that he did order them, that would bind defendant as effectually as though he made the order in person.

"If you find that when defendant was absent from his said store he left said Hart in possession and charge of the store for the purpose of carrying on the business of the store, and that the proper management of the store justified making orders for more goods to supply stock as depleted by trade, that would justify plaintiff in supplying and filling orders of said Hart as defendant's agent, unless plaintiff had knowledge of some limit to time of Hart's authority to make such orders. At the reception by plaintiff of the letter dated October 25, 1885, by them first offered in evidence, plaintiffs had notice to honor no order unless accompanied by defendant's name. That notice is binding on plaintiff unless after that defendant notified plaintiff to the contrary, or after that gave authority to Hart to make the orders for the goods in question, and that, pursuant to such authority given after the said letter of October 25, 1885, if any, Hart did order and receive the goods in question.

"If you find that Hart ordered and received the goods into the store, but at the time he did so had no authority so to do, you must find that the same was without defendant's authority, unless you find that defendant afterward

ratified such acts of Hart. If defendant afterwards ratified the acts of Hart, they are binding on defendant as effectually as if authority had been conferred before the act ratified. But if you fail to find that Hart's acts were by defendant's authority, and fail to find that afterwards defendant ratified the same, then you must find that defendant is not bound by such acts of Hart. If you believe from the evidence that the goods in question were placed in defendant's store, and that afterwards he saw them there, and had full knowledge of all the facts and circumstances of how they got there, and from whom they were obtained, and that after such knowledge he permitted them to remain as part of the stock of the store exposed for sale, and by himself or authorized agent sold any part thereof and kept the proceeds of such sales, or part thereof, then you will find a ratification of the bringing of the goods into the store as to each order so ratified.

"3. The foregoing statements of the law are deemed sufficient to cover the issues joined by the pleadings so far as necessary for your guidance. If you find that plaintiff sold and delivered to the defendant as alleged in the petition the goods therein mentioned, find for the plaintiff, and assess its damages as the sale price of the goods, with interest at seven per cent per annum from the time the same became due. If you fail to so find, you will find for the defendant."

The second assignment is the refusal to give the first, second, and third instructions, asked for by the defendant, as follows:

"1. If the jury believe from the evidence that the defendant, before the sale of the goods sued for, notified plaintiff in writing to sell no goods unless his name accompanied the order, then, before they can recover, it is incumbent on them to show by satisfactory evidence that the order was either given by defendant in person or by some one duly authorized for that purpose.

"2. That an agent may have either general or special powers; and if the jury believe that the man Hart had only limited or special powers to manage the work of the shop, and no power to contract for or to buy goods, and that the plaintiffs at the time of dealing with him knew that to be the fact, then the defendant is not bound by the acts of Hart in that behalf unless he subsequently approved or ratified such acts.

"3. That if the jury believe from the evidence that the goods sued for were sent by plaintiffs to defendant's place of business at Oxford, Kansas, without the authority of and against the wish of defendant, and that as soon as defendant knew that such was the case, he repudiated the transaction and notified plaintiffs that they were subject to their order, and that he returned to them under their instructions said goods, then the defendant is not liable for said goods, nor for the value of any goods sold, lost, damaged, or stolen, before he knew of the receipt of the same at his place of business, unless he received or appropriated the proceeds of the same."

The contention between the parties then was narrowed down to the amount of goods returned by Gilbert to plaintiff, the price at which Gilbert should be credited therefor, and whether he had discharged his whole duty in respect to the return of the goods when he shipped them by the only railroad from Oxford to Kansas City, consigned to the plaintiff.

The consideration of this branch of the case, it will be seen by referring to the instructions given, was not submitted to the jury; and while it is true that the evidence applicable thereto is meager, and especially so on the part of defendant, yet it being the plaintiff's duty to present a case to justify a verdict and judgment in his favor, I do not think that the second and third instructions of the court to the jury, which profess to cover the whole case, and which ignore and leave out all consideration of this branch of the case, can be sustained.

For the same reasons the third instruction asked by defendant and refused, should have been given, and its refusal was error.

Upon the trial the defendant offered in evidence an account book which purported to contain on one page a ledger account kept in his own hand-writing against and in favor of the plaintiff. He stated on oath, "I simply kept a ledger account with them;" that said account had been fully paid; that there was some error in it; that it showed an over-payment of seventy cents, and a balance of that amount in defendant's favor; but that the account had been balanced nevertheless.

Upon cross-examination he stated that the book was made by himself; that it was contemporaneous with the transactions therein; was commenced when he commenced business with the plaintiff; that it was all in his own hand-writing; that the book was an old volume that used to belong to the land business; and that a sort of an account was kept by the bookkeeper, but that the part entered up here and offered in evidence was all in his own writing, and that no one else had any business with it. The page of the book offered seems to have been admitted without objection. Upon the cross-examination of defendant by counsel for plaintiff he was asked:

Q. You spoke of a book that belonged to the harness shop?

A. This was my ledger.

Q. The ledger you kept in the harness shop?

A. Yes, when I kept accounts against my customers.

Q. And that was the ledger you left there with Hart?

A. No, sir; I did not leave this ledger with Hart; he never made any marks in it.

Q. Did you lock it up every day?

A. I didn't leave it with him.

Q. Where is the book he kept the accounts in when he done business?

A. There was a sale book.

Q. Have you got it handy?

A. Yes.

Q. I would like to see that very much.

(Defendant, by his counsel, objects to being required to produce any other book, because it is irrelevant, immaterial, and improper cross-examination; which objection being overruled, the defendant was ordered to produce the book in evidence, and did so.)

Q. Did Mr. Hart keep that book?

A. No; there is no keeping about that.

Q. Did Hart put a scratch in there?

A. Yes.

Q. Now tell the jury whether he kept it during the six weeks you were away?

A. I think likely he did. * * *

(Defendant objected to any testimony concerning this book as not proper cross-examination. Objection overruled by the court, to which defendant excepts.)

(Plaintiff offers in evidence the book copy attached to the bill of exceptions, marked "exhibit F, defendant," which is objected to and objection overruled, and defendant excepts.)

Q. Did you say Hart put this writing in there?

A. You asked if Hart made a scratch there.

Q. I will ask you if during the six weeks of your absence he had full charge of this book, while you were hundreds of miles away from it?

(Objected to and overruled, and exceptions taken.)

A. I cannot tell you. I see there are two or three different hand-writings in the book, and it is not Hart's altogether; when you get right down to that, I cannot tell you who kept it.

Q. Was this book in the harness shop?

A. I presume it was; I found it there.

Q. Was it not there when you left?

A. No; I think I left it in the bank, to the best of my knowledge. * * *

Q. Is any of this hand-writing Mr. Hart's?

(Objection made to identifying Hart's hand-writing in this manner as not proper cross-examination. Overruled by the court, and exception taken.)

Q. Is any of this writing the hand-writing of Hart?

Witness examines the book, and answers, "I don't see any of his yet; no."

Q. Do you know his hand-writing well?

A. Yes; that is, I ought to.

Q. There is his hand-writing?

A. There is his hand-writing on page 379.

(Plaintiff offers page 379, marked exhibit "X," in evidence. Defendant objects, and objection overruled. Exception taken.)

Q. This is the hand-writing of Hart?

A. I think it is.

Q. When did he show it to you?

A. He never showed it to me; I found it a month ago—this list of crooked orders. I happened to open it and look the bills over, and found the bills correspond with the list of orders made. * * *

Q. Was Swain in your shop when you went away?

A. Swain had gone then; I am mistaken about that being Swain's.

Q. Leave Swain alone, and come to the next to him.

A. I should say that from what I have seen of Hart's brother, that Hart had his brother make these entries; his brother was a better scribe than he was.

Q. You tell the jury you believe to the best of your knowledge it was done under the direction of Hart?

A. No, I don't; it is not W. N. Hart's hand-writing.

(Objected to; objection overruled; defendant excepts.)

Q. Is it his brother's hand-writing?

A. I cannot tell; I just surmise what it is. * * *

Q. Whoever was running shop kept that book ?

A. It was his business if I was out and he sold a dollar's worth to enter it.

Plaintiff offers in evidence so much of the book as refers to the time that Hart was there in charge of the shop. Copy attached, marked plaintiff's exhibit "A 1."

Defendant objects that this book is in the custody of the court, and not proper cross-examination, and this is part of their case in chief; and objects, first, that this is not the proper time for plaintiff to interrupt the conducting of the defense to offer anything of that kind; second, because there has been no foundation laid, it is immaterial, irrelevant, and incompetent, and has no bearing on the issue in the case. There is a multitude of entries in the book, as shown by witness's testimony, not in his own hand-writing, by his authority nor knowledge, nor does he know who made them, and he should not be bound by such entries. It is further objected that there is a multitude of entries that have no relation to any part of this controversy, and can tend to nothing but to cumber the record. Objections overruled.

The plaintiff offers in evidence 44th page up to 71st page, January 1 up to March 25, inclusive; and pages 379, 380, 381, 382, and 384, of the cash-book, copies of which are marked plaintiff's exhibit "A." Objected that the last objection should follow this offer also. Objected further to the entry on page 379, that it does not state who the parties are with whom the account claims to have been made; and further, that it is disclosed in the testimony of defendant, already on the stand, in regard to this entry, that he did not make it, and never knew of its existence until last month, and don't know how it came there, and he should not be bound by it; that standing alone, as it does, no one can tell by inspection of it what it means; that in order to be binding upon anybody, it would have to have extrinsic evidence. All objections overruled.

Thereupon there was received by the court, read to the

jury, and attached to the bill of exceptions, twenty-six pages of an account book, containing entries of credit in favor of the plaintiff and charges against various other persons, chiefly devoted to memoranda of charges of money against W. N. Hart and R. V. Hart, and of various different sums of money deposited in bank.

There can be no doubt that it was error to receive this book of accounts in evidence. The statute provides distinctly in what cases, and upon what proof, account books may be given in evidence. (Sec. 346, Civil Code; *Masters v. Marsh*, 19 Neb. 467; *Van Every v. Fitzgerald*, 21 Id. 36; *Holland v. Com. Bank*, 22 Id. 579; cited by counsel for plaintiff in error.) But at the consultation it was suggested that possibly the admission of this book in evidence, though error, was without prejudice to the plaintiff in error.

Upon a thorough examination of the case, I am satisfied that it was highly prejudicial to the plaintiff in error. Defendant, on the stand as a witness in his own behalf, had repeatedly testified that William N. Hart had deposited no money to his credit in the bank at Oxford, where he had been directed to deposit such sums as he might take in during defendant's absence, nor had he deposited any money to the credit of defendant in any bank. This book, which was allowed to go to the jury as evidence, contained nine entries of separate and distinct deposits of money in the Oxford bank, amounting to \$478.77. Also, it was the theory of the defendant, upon which he predicated his defense, that his shop at Oxford was but a small, petty affair; that the entire stock in trade of said shop at the time of his departure, and during his absence, was worth but a few hundred dollars, and while it was a part of his theory that a large amount of goods had been ordered without authority, by W. N. Hart, and brought into the shop in his absence, yet it was also a part of his theory that but a very small amount of the goods had been disposed of by Hart or by any one else; and by the book introduced in evidence, and

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laid before the jury, it appeared that a considerable amount of goods, at least one or two thousand dollars' worth, and probably more, had been disposed of by Hart in the absence of defendant.

This evidence, if true and properly admitted, not only would necessarily, but ought to, overturn the defense. It therefore must have been highly prejudicial. The case throughout is an involved and unsatisfactory one—involvement in contradictions, and unsatisfactory as to veracity; and a due regard to justice, good practice, and fair dealing, requires that there should be a new trial.

The judgment of the district court is therefore reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other Judges concur.

C. C. KENNEY, PLAINTIFF IN ERROR, v. S. S. HEWS,
DEFENDANT IN ERROR.

[FILED MARCH 20, 1889.]

Statute of Frauds: AGREEMENT. S. S. H. held a judgment for \$653 and costs, against Dr. A. N. L., who owned a stock of drugs and notions worth from \$1,500 to \$3,000, and owed debts amounting to about \$1,500, besides the said judgment of S. S. H., for one of which debts C. C. K. was surety. S. S. H. resided at H., in R. county; A. N. L. at S., in R. county, and C. C. K. at L., in L. county. A. N. L. was afflicted with a fatal disease, and known to be near his end, when C. C. K. went to S., visited A. N. L., talked with him about his condition and affairs, examined into his business, stock, books, etc. Coming away, he left a proposition with one J. C. Lincoln, to be presented to A. N. L., to the effect that he, C. C. K., would pay \$1,500 of the debts of A. N. L., specifying them, and including the debt for which C. C. K. was surety, in consideration of a bill of sale of the stock of

drugs and goods, fixtures, accounts, books, notes, etc. Upon reaching his home C. C. K. wrote and posted a letter to S. S. H., as follows: "I have just returned from a trip to see Dr. Long; he is very near his end, and will die in a short time. I looked over his business, and find it in good shape. If J. C. Lincoln and myself have time, we can pay every debt with the goods, and have quite a sum left for his wife. Now I don't want you to make any costs or trouble, as his wife says she will give it all to the lawyers before she will pay it; but I think in a short time after his death we can arrange a settlement with you so you and she will be satisfied. So don't listen to any lawyers or any one, and if we can arrange it, you will get your just dues, as I hold control of the stock, and will let you know when I go down, which will be in a few days after his burial. So keep quiet, and if anything you want to know write me." This letter was received by S. S. H. while on his way to the county seat to issue execution against A. N. L. and levy on his goods; but, relying on said letter, he desisted. Three days after the date of said letter, J. C. Lincoln, as agent of C. C. K., presented said proposition to A. N. L., who accepted the same and executed a bill of sale of said goods, books, accounts, notes, etc., to C. C. K., and delivered the same, together with the keys and possession of the store, etc., to J. C. Lincoln, as agent for C. C. K. Thereupon C. C. K. entered into possession of said store, and sold and disposed of the goods and collected the notes and accounts. In an action by S. S. H. against C. C. K. for the amount of his judgment, *held*, that the said letter, taken in connection with the action of S. S. H. in giving the time required by C. C. K., and not making costs or otherwise interfering with C. C. K. in the control and disposition of said goods, contained all the elements of an agreement in writing to pay said judgment, upon a sufficient consideration, and was good under the statute of frauds

ERROR to the district court for Richardson county.
Tried below before BROADY, J.

Marquett, Deweese & Hall, and *J. D. Gilman*, for plaintiff in error, cited: *Brandt on Suretyship and Guaranty*, sec. 71; *Taylor v. Pratt*, 3 Wis. 674; *Hutson v. Field*, 6 Id. 407; *Emerick v. Sanders*, 1 Id. 77; *Gregory v. Logan*, 7 Blackf. 112; *Jones v. Palmer*, 1 Doug. 379; *Underwood v. Campbell*, 14 N. H. 393; *Castle v. Beardsley*, 10 Hun, 343; *Wain v. Warlters*, 5 East, 10.

E. W. Thomas, and *C. Gillespie*, for defendant in error, cited: *Bonns v. Carter*, 20 Neb. 566; *Bonns v. Carter*, 22 Id. 495; *Winner v. Hoyt*, 66 Wis. 227; (S. C., 28 N. W. Rep. 384;) *Bigelow on Estoppel*, 557.

COBB, J.

The plaintiff below recovered a judgment against the defendant, Kenney, in the district court of Richardson county, in the sum of \$753 and costs. His cause of action was substantially as follows: Hews had previously recovered a judgment in the same court against A. N. Long for the sum of \$653 and costs, which judgment remained unpaid and unappealed from when the said Long died intestate, sometime in the month of August, 1885, at Salem, in Richardson county, where he had formerly resided. At the time of his death he was the owner of a drug store and stock of drugs and merchandise therein, together with book accounts for goods sold, and other accounts, alleged by the plaintiff to be worth more than enough, if properly administered, to pay all the debts of the said deceased.

The plaintiff in error, C. C. Kenney, had a claim against the said A. N. Long, and shortly before the death of the latter, Kenney visited him, and while there, arrangements were made between them that Long should assign to Kenney the said drug store, with the notes and accounts, for the purpose of paying the debt due to Kenney, and other debts. This arrangement was not consummated, however, until some days after Kenney had returned to his home at Lincoln. Then, on the 6th day of August, 1885, a bill of sale was executed by Long to Kenney, as follows:

"For and in consideration of fifteen hundred dollars, I have this day sold to Dr. C. C. Kenney, of Lincoln, Nebraska, my entire stock of goods, consisting of medicines and drugs of every description, oils, paints, liquors, and sundries, and all other goods that I own, including scales, and all

furniture belonging to me and in the store building where I have been doing business in the town of Salem, Richardson county, and state of Nebraska, and also including in the above sale, for the consideration therein mentioned, all my book accounts and notes that are due me. I hereby assign said book accounts and notes over to the said C. C. Kenney, and the payment of fifteen hundred dollars above mentioned is to be made as follows: that the said C. C. Kenney assumes and agrees to pay the following-named debts, releasing me and my heirs from all obligation to pay the same, to wit:

"One note, with interest, to K. R. Davis, for \$500. Signed, A. N. Long and C. C. Kenney.

"One note due Bank of Salem for \$100. Signed, A. N. Long and J. R. Campbell.

"One note due First National Bank, Falls City, Neb., for \$150.

"One note due William Lord, of \$100; McPike & Fox, of Atchison, Kansas, \$164.77; James Walsh & Co., of St. Joseph, Mo., \$71.75; Peckham & Mansfield, \$15; Louis Stearns, \$135; Herman Teihen, \$250.

"Payment of the above-named obligations the said C. C. Kenney fully assumes, and is to pay in full consideration of stock, notes, and accounts, as mentioned above. Given under my hand this 6th day of August, 1885.

"[SEAL.]

A. N. LONG."

After the return of Kenney to Lincoln, and three days before the execution of the bill of sale, at Salem, he wrote and mailed to the defendant in error, at his home in Richardson county, the following letter:

"LINCOLN, 8-3, 1885.

"*Mr. S. S. Hews:* DEAR SIR—I have just returned from a trip to see Dr. Long; he is very near his end, and will die in a short time; I looked over his business, and find it in good shape. If J. C. Lincoln and myself

Kenney v. Hews.

have time, we can pay every debt with the goods and have quite a sum left for his wife. Now I don't want you to make any costs or trouble, as his wife says she will give it all to the lawyers before she will pay it; but I think in a short time after his death we can arrange a settlement with you so you and she will be satisfied. So don't listen to any lawyer or any one, and if we can arrange it, you will get your just dues, as I hold control of the stock, and will let you know when I go down, which will be in a few days after his burial. So keep quiet, and if anything you want to know write me.

“Respectfully, C. C. KENNEY.”

This letter was received by Hews when, as he alleges in his testimony on the trial, he was on his way to the county seat to see his lawyer about the collection of his judgment against Long; to have an execution issued, if one was not already issued, and if one had been issued, to place it in the hands of the sheriff, and have immediate proceedings taken for the collection of the judgment. He also testified that in consequence of the receipt of the letter, and of the statement of the writer therein, he did not go to the county seat, but suspended all proceedings for the collection of the debt, relying upon the promises contained in said letter.

The exact date of the death of Long does not appear either in the pleadings or proof; but it occurred shortly after the date of the bill of sale and the delivery of the drug store and property to the agent of Kenney. There was no property belonging to the deceased, Long, other than that transferred by the bill of sale. It does not appear that any administrator of the estate was ever appointed. Kenney took possession under said bill of sale, and disposed of the stock of drugs, and collected such of the notes and accounts as were collectible.

The defendant, plaintiff in error, by his answer to the petition of the plaintiff, defendant in error, set out the

making and delivery to him of the bill of sale by the deceased, Long, in his life time; alleged that the same was given for a good and full consideration; that at the time of the making of the sale, Long himself fixed the terms of the sale and the payments to be made for the property, and managed and controlled the same, and left the defendant no power nor authority to pay any debt to the plaintiff, nor any right to do so, nor any discretion whatever, but then and there ordered and directed that as a full purchase price of said property, and for the same, defendant should pay the said sums and claims against said Long set out and enumerated in said bill of sale, which sums were by said Long designated and specified; and that defendant has strictly complied with his said contract, and paid in full all of said sums by him to be paid, and has no property in his hands belonging to said Long or to his estate; that at the time of the defendant's purchase of said stock and property, said Long was indebted to defendant in about the sum of \$287, and that said Long did not and would not allow such indebtedness to apply in such purchase as a payment, but did insist and order that defendant actually pay every part of such purchase price of said goods and property; and defendant did so pay the said sums in full in every particular, and fully complied with the terms and conditions of such payment.

The cause was tried to the court, and there was a finding of all the issues in favor of the plaintiff, S. S. Hews, and judgment was rendered in his favor. The cause was brought to this court by defendant Kenney.

There are several grounds of error set out in the petition, but only those argued in the briefs of counsel will be considered. These are:

I. That the court erred in holding that the plaintiff's petition states sufficient facts to constitute a cause of action.

II. In admitting in evidence the plaintiff's letter, marked "B."

III. In holding that the letter contained a written promise to pay the debt due to S. S. Hews from A. N. Long.

The case turns upon the legal construction to be placed upon the letter of C. C. Kenney to S. S. Hews, heretofore set forth. The plaintiff in error invokes the statute of frauds. Sec. 8 of chap. 32, page 443, Compiled Statutes, (referred to as the statute of frauds,) provides that: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing and subscribed by the party to be charged therewith. * * * 2. Every special promise to answer for the debt, or default, or misdoings, of another person——" etc.

The first contention of counsel is that the letter does not contain an agreement sufficient to bind the writer thereof to the payment of the judgment of the defendant in error against Long. While it will not be denied that there is force in the argument to that effect, I think that a fair, reasonable, and natural, construction of the letter, must bring one to the conclusion that it contains an agreement on the part of Kenney that in consideration of Hews' refraining from making costs or trouble, and allowing the writer and J. C. Lincoln sufficient time after the death of Long to settle up his business and convert his property into money, he would pay Hews and satisfy his judgment against Long. It is true that he does not say it in so many words; but what other construction can be given to the words of the letter: "So don't listen to any lawyer or any one, and if we can arrange it, you will get your just dues, as I hold control of the stock"? While from the bill of exceptions it does not appear that Kenney, at the date of the letter, had personal possession of the stock referred to, yet it does appear that on the morning of the sixth of August, three days subsequent to the date of the letter, pursuant to a proposition previously made by Kenney to Long, the latter executed the bill of sale heretofore set forth, and delivered the

same together with the keys of the drug store, to the said J. C. Lincoln, for Kenney, who received and held the same for Kenney until the arrival of the latter, pursuant to a telegraph dispatch from Lincoln to him, and that Kenney thus had entire and complete control of the same until, with the assistance of Lincoln, he had disposed of the stock of goods and the notes and accounts.

It also appears from the bill of exceptions that the statement of Kenney, in his letter to Hews, that he had "just returned from a trip to see Dr. Long," and had "looked over his business," was true; that, being security for Long on a note for a sum of about \$500, and having a natural interest in an old acquaintance with whom he had transacted important business matters, he had visited Salem in the interest of Dr. Long and his business affairs at least once, and had made himself familiar with the same, and had just returned thence to his home at Lincoln when he wrote the letter to Hews. While at Salem, and at the residence of Dr. Long, he had talked over the business affairs of the latter with him in the presence of J. C. Lincoln, and had talked over the indebtedness of Long to Hews, when, as testified to by Lincoln on the trial, Kenney had expressed the thought that "if there was the amount of property there was, rather than get into a law-suit or trouble of execution, and selling the property at sheriff's sale, the matter might be compromised by giving the widow something to compromise with Hews." At the same time, according to the evidence of the witness Lincoln, after Kenney had thoroughly examined into the condition of Long's affairs, he authorized him to propose to Long to pay \$1,500 of the latter's indebtedness, including the \$500 for which he was security, in consideration of the assignment and transfer of the property substantially the same as it was afterwards made.

It appears also that Hews, having obtained a judgment against Long, while he probably hesitated to issue execu-

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tion against him during his last illness, fully intended to do so before his decease, which was expected before long, and had finally started to the county seat, from his home near the village of Humboldt, to instruct his attorney to order out an execution, if one had not been issued, and in either event to instruct the sheriff to proceed to Salem for the purpose of levying on the goods of Dr. Long. Upon his arrival at Humboldt, he received the letter from Kenney, which he was unable to read, being an illiterate person; but knowing the business card of Kenney, on the envelope, he returned home to have the letter read to him by his confidential friend, and upon learning its full contents, he relied upon the promise therein contained, and did as requested by Kenney; allowing him and J. C. Lincoln all the time which he required to settle up the affairs of Dr. Long; did not make any costs or trouble; didn't "listen to any lawyer or any one;" and so allowed Kenney and Lincoln to arrange their matters as proposed. This letter on the part of Kenney, and the acts and failure to act, of Hews, constitute, I think, all of the necessary elements of an agreement. I think the letter may be properly interpreted as a proposition on the part of Kenney to Hews that if he would not issue execution against the property of Long, and would allow him (Kenney) the undisturbed control of it, without molestation, he would in due time pay the judgment in question. It is true that he coupled with the proposition, one that he would pay it out of the proceeds of Long's estate, but he informed him in the same letter that he had just returned from an investigation of Long's affairs and business, and found them in good condition. The acts of Hews may be, and I think must be, properly, construed as a full acceptance of this proposition; and the two together constitute an agreement within the meaning of the statute of frauds. There is also a sufficient consideration for this agreement in the giving of time by Hews to Kenney and J. C. Lincoln to "pay every debt with the goods and have

quite a sum left," refraining from making trouble and costs by the issuance of an execution, and by turning a deaf ear to all lawyers.

Were it necessary to invoke the doctrine of estoppel in order to sustain the judgment of the district court, I think it could be successfully done, and that by the facts of the case the plaintiff in error would be held to be estopped to deny that sufficient assets of Dr. Long came into his possession, or under his control, with which to pay the judgment of the defendant in error. As to this position, the cases of *Dock v. Boyd & Co.*, 93 Pa. St. 92; *Daniel v. Robinson*, 33 N. W. R. 497, and other cases cited by counsel for defendant in error, are cases in point, and seem conclusive. See also *Rogers v. Emplie Hardware Co.*, 24 Neb, 553.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

36	222
38	471
26	222
42	728
26	222
47	91
26	222
60	480
50	779
26	222
159	444

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR, v. M. H. VANDEVENTER ET AL., DEFENDANTS IN ERROR. .

[FILED MARCH 20, 1889.]

- 1. Railroads: LIABILITY AS COMMON CARRIERS.** A railroad company operating a line of railroad in this state, is a common carrier, and cannot, under the provisions of the constitution, limit its liability as such by special agreement with a shipper.
- 2. Trial: INCOMPETENT EVIDENCE.** When upon a trial, evidence, incompetent or illegal but which tends to prove the case of the side offering it, is admitted without objection, and considered by the jury in agreeing upon their verdict, the incompetency or

illegality of such evidence will not be considered on error or appeal.

3. ———: VERDICT: SPECIAL FINDING: ERROR WITHOUT PREJUDICE. When upon a trial to a jury immaterial or improper questions for special findings are submitted to a jury at the request of a party afterward complaining, and the jury is discharged without answering such questions, *held*, error without prejudice.

ERROR to the district court for Richardson county. Tried below before BROADY, J.

B. P. Waggener, and *Isham Reavis*, for plaintiff in error, cited: *Doom v. Walker*, 15 Neb. 339; 19 Central Law Journal, 164; *Wabash, St. Louis, & Pacific R. R. Co. v. Black*, 11 Bradw. 465; *Dawson v. St. Louis, Kansas City & Northern R. R. Co.*, 76 Mo. 514; *Moore v. Great Northern Ry. Co.*, 10 L. R. (Ir.) 95.

Frank Martin, for defendant in error, cited: Sec. 4, art. 11, Const. of Neb.; *A. & N. R. R. Co. v. Washburn*, 5 Neb. 117.

COBB, J.

This action was brought in the district court of Richardson county by the defendants in error against the plaintiff in error, for \$256.50, the alleged value of fifteen hogs, being part of a car load of hogs shipped by the defendants in error over the railroad of plaintiff in error from Stella, Nebraska, to Kansas City, and which were claimed to have been lost by reason of the negligence of the railroad company.

The defendant in said action, among other defenses, alleged, in its answer, that no notice was given defendant of such pretended loss of hogs before removing the remainder from the car at Kansas City, as by the terms of the shipping contract plaintiffs were bound to do as a condition

precedent to a right to demand of defendant reparation for any loss which might occur in the shipment of said stock.

The cause was tried to a jury, which returned a verdict for the plaintiffs with damages of \$334.55.

The following interrogatories were submitted by the court to the jury for special findings of fact:

1. Was the company or its agents guilty of any negligence in the transportation of the hogs? and if the jury answer Yes, they will say in what particular the company was negligent.

To which the jury answered, Yes; in the delay of the car containing the hogs, from Hiawatha to Atchison, Kansas, of twenty-four hours.

2. Was notice in writing of the loss of fifteen hogs given the defendant before the stock was mingled with others, or removed from the place of destination?

To which they answered, We don't know.

The defendant's motion for a new trial having been overruled, and judgment having been entered on the verdict, the cause is brought to this court on error. The errors assigned are numerous; but such only as are discussed in the brief of counsel will be considered. These arise chiefly upon the construction and legal effect to be given to certain clauses in the contract of shipment, and the effect to be given to the evidence introduced by the defendant in the court below as to the number of hogs shipped, and the number delivered by the railroad company at the place of delivery.

Morgan H. Vandeventer, one of the plaintiffs, testified in their behalf that he shipped a car of hogs on May 29, 1883, from Stella, Nebraska, to Kansas City, Missouri, consigned to A. J. Gillispie & Co.; that there were sixty-nine hogs shipped, and that when the car reached the Kansas City stock yards there were but fifty-four; that the average weight was 261 pounds, and a fraction over; that the hogs were worth in the market \$6.80 per 100.

On cross examination by counsel for defendant below, the witness stated that he received most of the hogs the day before he shipped them; that he had asked for a car, and when it was sent, found it was a large thirty-three-foot car, and that his stock would not all be in, in time to ship that day; that there were a few hogs he expected that did not come, and finding that he had engaged a large car, he contracted for more hogs to come in the next morning; that he had on his books the names of parties who brought in hogs each day, the number, and price paid, and that fifty-three hogs came in on the first day; that he separated the hogs in the evening, and there were no other hogs in the yard at the time; that there were two yards in the north side of the shute, and he put a part in the north side, a part in the southwest corner in the south side, and cut out two little ones that he got in, by themselves; * * * that the next morning he let them all by together, and found he had fifty-three in the yard; that he received there between that and loading time, (referring to his book,) five from Witters, one from Jones, five from McKinnegar, and five from Dresser, making sixteen that morning, and making sixty-nine hogs in all.

In answer to the question, When did you find out there was a shortage in your hogs? the witness answered: At that time they (the plaintiffs) were operating mostly on the B. & M., (Burlington & Missouri River R. R.,) and had their head-quarters with Mr. Lincoln, at Salem. All returns were made to Mr. Lincoln at that time, and it was two or three days before he was down at Salem, and when he went there Mr. Lincoln showed him the bill. It was two or three days after the shipment.

He further testified on cross-examination:

Q. What do you know about the reception of the hogs at Kansas City? who received them?

A. A. J. Gillispie is the man we consigned them to; he received them.

Q. He is a commission merchant?

A. Yes.

Q. You consigned the hogs to him?

A. Yes.

Q. Did he make any report to you?

A. Why, he was not aware, until we got the sale bill and notified him, that there was a shortage in the hogs.

Q. What sale bill do you mean?

A. The bill we received from him for the sale of the hogs in the yard.

Q. He could have got no information from the contract as to the number—that was “one car load of hogs?”

A. Yes, one car load; the agent did not count the hogs, and did not give it in the bill.

Q. What did you say?

A. I say at that time the Missouri Pacific agent did not count the hogs. He told me he was not required to do so; for that reason there was no number stated in the bill—just one car of stock.

Q. Then Mr. Gillispie received his information from you?

A. Yes; when we heard from him and found there was a shortage.

Q. How long after you received notice from your consignee did you give notice to the railroad company that some hogs were missing?

A. It was not a great while. It might have been a week—from three or four days to a week.

John H. Myers, witness for the defendant below, testified: That in 1883 he was engaged in running a freight train as conductor, on the night of May 30, 1883, on the Missouri Pacific railroad, between Kansas City and Atchison; that he took possession of the train coming from Stella, Richardson county, Nebraska; that he recognized the number of the car in which plaintiff's hogs were shipped, as one of the cars of that train; that he remembered the

circumstance from the fact that when there is a shortage they always send back to the conductor for examination; when anything is lost in transit they send to the conductor, and ask for a statement of the car and its contents and its condition; that he was called on for a statement of the facts in regard to this car, and from that fact he remembered the circumstances. Witness further described the different manner of sealing the cars; that it was the duty of the freight-train conductor, upon receiving a freight train, to go and look at the cars and see that they were properly sealed, describing the manner of doing it, and stated that was done in the case of this car; that the doors on both sides were sealed, and the seals intact; that he arrived in Kansas City with the train at about three o'clock A. M., being one hour late, and turned the train over to the yardmaster with all the seals intact.

Frederick H. Mickelwait, witness for defendant below, testified: That on or about May 29, 1883, he was freight conductor on the Missouri Pacific railroad line between Louisville, Nebraska, and Hiawatha, Kansas; that he conducted the train having car 4587, containing the hogs in question; that he received the car at Stella, and delivered it at Hiawatha; that on receiving it he made an examination of the seals and found them "O. K.;" and that they remained untampered with until he delivered them to the next conductor, at Hiawatha, at about 2:45.

On the trial, the plaintiffs introduced in evidence the following contract:

"RULES AND REGULATIONS

FOR THE

"TRANSPORTATION OF LIVE STOCK.

"Live stock of all kinds at the following estimated weights: First-class rates: One horse, mule, or horned animal, 2,000 pounds; two horses, mules, or horned animals, 3,500 pounds; three horses, mules, or horned animals,

5,000 pounds; each additional animal to be rated at 1,500 pounds; jacks or stallions, 4,000 pounds each; calves, hogs, and sheep, each, 300 pounds.

"In case the consignor agrees to save the Missouri Pacific Railway Company from liability for any or all the causes enumerated in the following contract, and also agrees to load, unload, feed and water, and attend to the stock himself, etc., as specified therein, the special rates of tariff based on such contract will be given.

"The said Missouri Pacific Railway Company, as aforesaid, will not assume any liability over one hundred dollars per head on horses and valuable live stock, except by special agreement. For the purpose of taking care of the stock, the owner or men in charge will be passed on the train with it, and all persons thus passed are at their own risk of any personal injury from any cause whatever, and must sign release to that effect indorsed on contract.

"LIVE STOCK CONTRACT.

<i>No. of Cars.</i>	<i>Initials.</i>
4587	Mo. P.

"STELLA STATION, May 29, 1883.

"This agreement, made between the Missouri Pacific Railway Company, of the first part, and M. H. Vandeventer, of the second part, Witnesseth: That whereas the Missouri Pacific Railway Company, as aforesaid, transports live stock only as per above rules and regulations: Now, in consideration that the said party of the first part will transport for the said party of the second part one car load of hogs to Kansas City station, at the rate of \$37 per car load, the same being a special rate lower than the regular rates mentioned in their tariff, the said party of the second part hereby releases the said party of the first part from the liability of a common carrier in the transportation of said stock, and agrees that such liability shall be only that of a private carrier for hire; and from any liability for any delay in shipping said stock after the delivery thereof to the

agent of said party of the first part, or for any delay in receiving the same after having been tendered to said agent.

"And said party of the second part hereby accepts for such transportation the cars provided by said first party, and used for the shipment of said stock, and hereby assumes all risk of injury which the animals or either of them may receive in consequence of any of them being wild, unruly, or weak, of maiming each other or themselves, or in consequence of heat or suffocation, or other ill effects of being crowded in the cars, or on account of being injured by the burning of hay, straw, or other material used by the owner, for feeding the stock or otherwise, and all risk of damage that may be sustained by reason of any delay in such transportation, and all risk of escape or robbery of any portion of said stock, or of loss or damage from any other cause or thing not resulting from the willful negligence of the agents of the party of the first part.

"And said party of the second part further agrees that he will load, unload, and reload, said stock at his own risk, and feed, water, and attend to the same, at his own expense and risk, while it is in the stockyards of the party of the first part awaiting shipment, and while on the cars, or at feeding or transfer points, or where it may be unloaded for any purpose.

"And it is further agreed that said party of the second part will see that said stock is securely placed in the cars furnished, and that the cars are safely and properly fastened, so as to prevent the escape of the stock therefrom.

"And it is further agreed that in case the said party of the first part shall furnish laborers to assist in loading and unloading said stock at any point, they shall be subject to the orders and deemed the employes of the said party of the second part while so assisting.

"And for the consideration before mentioned, said party

of the second part further agrees, that as a *condition precedent* to this right to recover any damages for any loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before said stock is mingled with other stock.

"And the said party of the second part, in consideration as aforesaid, further agrees that in case of total loss, the sum of one hundred dollars per head shall be taken and deemed as liquidated damages for such loss; and in case of injury or partial loss, damage shall be measured in the same proportion.

"This contract does not entitle the holder or other parties to ride in the cars of any train except the train in which his stock, referred to herein, is drawn or taken. Neither does it entitle him (and the party of the second part named in this contract so expressly stipulates, admits, and agrees) to return passage from ——— to ———, unless this said contract is presented within five days from the date hereof. Nor does it entitle any person except the party of the second part, and parties who accompany him in charge of said stock for the purpose of assisting him in taking care of them, as specified in and upon this contract, (and does not include women, infants, or other persons unable to do and perform the services required, as expressed in this contract,) to return passage within the said five days; the object, purpose and intent of the return pass being to enable the said party of the second part hereto, or his men in charge as expressed in contract, and no other person, to return to ——— thereon, at any time within five days from date hereof, and not thereafter.

"And it is further stipulated and agreed between the parties hereto, that in case the live stock mentioned herein is to be transported over the road or roads of any other rail-

road company, the said party of the first part shall be released from any liability of every kind after said live stock shall have left its road; and the party of the second part hereby so expressly stipulates and agrees; the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the Missouri Pacific Railroad Company, excepting to protect the through rate of freight named therein.

"The evidence that the said party of the second part, after a full understanding thereof, assents to all the conditions of the foregoing contract, is his signature hereto.

"[Signed] F. R. MASON, *Agent*,
"For the *Missouri Pacific Railway Company*.
"M. H. VANDEVENTER, *Shipper*."

Under this contract it is claimed by the plaintiff in error that the defendants in error, not having given notice in writing of their claim for reimbursement to some officer of the railroad company, or to its nearest station agent, before the removal of the car load of hogs from its place of destination, or from its place of delivery to the shipper, and before the stock was mingled with other stock, have therefore no right of action against said railroad company for a loss of any portion of said hogs.

The plaintiff in error cites, in support of this, 19 Central Law Journal, 164; also, *Wabash, St. Louis & Pacific R. R. Co. v. Black*, 11 Bradw. 465; *Dawson v. St. Louis, Kansas City & Northern R. R. Co.*, 76 Mo. 514; and *Moore v. Great Northern Ry. Co.*, 10 L. R. Ir. 95.

This article, and these cases, are to the effect that the law governing common carriers, both in England and America is to-day substantially as laid down by Lord Holt in the year 1703, quoted in the article cited, that "the law charges this person, thus intrusted to carry goods, against all events but acts of God and the public enemy."

But, in the language of Mr. Justice Strong, in the opin-

ion of the supreme court of the United States in the case of *Express Co. v. Caldwell*, 21 Wallace, 264: "Notwithstanding the great vigor with which courts of law have always enforced the obligations assumed by common carriers, and understanding the reluctance with which modifications of that responsibility imposed upon them by public policy have been allowed, it is undoubtedly true that special contracts with their employers limiting their liability are recognized as valid if, in the judgment of the court, they are just and reasonable; if they are not in conflict with sound legal policy."

This opinion, last above cited, was delivered in October, 1874, and scarcely more than substantially followed the earlier ones of *York Company v. Central Railroad*, 3 Wallace, 107, and *Railroad Company v. Lockwood*, 17 Id. 357.

The present constitution of this state was framed, submitted, and adopted, in the year 1875. Section 4 of article 11 of the constitution provides that "the liability of railroad corporations as common carriers shall never be limited." This clause expresses the supreme law of the state. If we can divine its meaning, then, as to us, the question is settled.

In following that general rule of construction, to consider the old law, and the mischief, in order to arrive at the meaning of a proposed remedy, we here take the old law as construed by the supreme court of the United States in the above case; and I think the mischief may be assumed to have been the facility with which common carriers were enabled either by deception or downright coercion to induce shippers to waive their rights under the law and enter into special contracts of shipment.

And while I concede as a general proposition that the true office of a state constitution is mainly to limit the powers of the legislature, and not to limit the effect of the contracts between parties, yet nearly all, and ours especially, contain departures from this rule. There may have been

instances of legislative limitation of the liability of railroad corporations, as common carriers, in some of the states of the Union or in Great Britain. My other engagements have not allowed me to make an exhaustive examination of the question; but I am aware of none, and am quite sure that if even some such existed, the mischief resulting was not appreciated in this state sufficiently to have originated the constitutional provision under consideration. So I conclude that the object and intent of the convention in proposing and of electors in adopting this provision of the constitution here referred to, was to put it out of the power of railroads, as common carriers, to limit their liability as such, by special agreements with shippers; and thus remove from their officers and agents all temptation to effect such exemption from liability, and the loss and damage to property which might of necessity follow the release of their responsibility and that of their agents therefor. (See *A. & N. R. R. v. Washburn*, 5 Neb. 117, a case which arose under the old constitution, but heard in this court under the new.)

Counsel for plaintiff in error complains of the second instruction given by the court to the jury on the trial. Numbers one and two are as follows:

"I. The jury are instructed that the defendant is a common carrier as to all property within the scope of its chartered powers; and it cannot by special agreement divest itself of such character; and therefore it is liable for the negligence of its servants.

"II. The jury are instructed that the contract in writing declares that it is, in consideration of a special rate, and if the jury believe from the evidence that the stock was not shipped on a special rate, but that plaintiffs paid the full regular rates for such service, then the special reservations, exceptions, or limitations, sought to be availed of by defendant, are without consideration, and the plaintiffs are not bound by the same where they restrict or limit the liability of defendant as a common carrier."

Instruction number one falling within the meaning of the constitutional power as above construed, is approved. Number two, in my opinion, goes too far in favor of the plaintiff in error, as it seems to imply that, had the property been shipped on a special rate, below the regular rate, the plaintiff in error could have availed itself of the special contract to avoid its liability as a common carrier, which, as I understand the effect of the constitutional provision, it could not do. No exception having been taken to the giving or the refusal to give other instructions, they will not be further considered.

As to the sixth clause of the shipping contract, set forth herein, and specially invoked by the plaintiff in error, if it were conceded that that clause was binding upon the defendants in error, there is an entire want of evidence to bring the case within its provisions. Kansas City was the place of destination of the property within its meaning. The shipper agreed as a condition precedent to his right to recover damages for any loss or injury to stock, to give notice in writing of his claim therefor to some officer of the party of the first part or its nearest station agent before said stock should be removed from its place of destination above mentioned, or from the place of delivery of the same to the party of the second part, and before such stock is mingled with other stock; and there is an entire lack of evidence, as shown by the bill of exceptions, of the removal of the stock from Kansas City, or of its having been mingled with other stock.

As to the special findings of fact, the second interrogatory ought not to have been given to the jury, for the reason that there was no evidence before them from which they could answer it. Had there been such evidence, I agree with counsel that it would have been error on the part of the trial court to refuse to send the jury back at the request of the defendant for the purpose of answering that interrogatory. These interrogatories were submitted

 Wilkins v. Wilkins.

at the request of the defendants—a request which should have been refused as to the second interrogatory; therefore, the refusal of the court to send the jury back for the purpose of answering it, was error without prejudice to the plaintiff in error.

As to the evidence of the number of hogs shipped by the plaintiffs, and received from them by the defendant in its car, and the number delivered by it to the consignee of the plaintiffs at Kansas City, the evidence of the number shipped was before the jury, and tended to prove that there were sixty-nine hogs shipped; and while it must be admitted that had the evidence in regard to the number delivered by the defendant to the consignee of the plaintiffs at Kansas City, been objected to by the defendant when offered on the trial, it would have been rejected; yet, as it was not objected to, and as it tended to prove that but fifty-four of the said sixty-nine hogs were delivered to the consignee of the plaintiffs, and was apparently considered by the jury in making up their verdict, its competency will not be here considered.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

vj) - 1161

JOHN WILKINS, PLAINTIFF IN ERROR, V. BRIDGET
WILKINS, DEFENDANT IN ERROR.

[FILED APRIL 4, 1889.]

1. **Judgment: SETTING ASIDE AFTER TERM.** A judgment or decree may be set aside, on motion, subsequently to the judgment term at which it was rendered for irregularity in procuring it to be entered.

26	236
35	290
26	235
47	803
26	236
55	603

2. ———: DIVORCE: SERVICE BY PUBLICATION. In an action for divorce, where service was had by publication only, the publication of a notice requiring the defendant to answer on or before the second Monday after completed service, instead of the third, as provided by section 110 of the Civil Code, would not prevent the court from acquiring jurisdiction, and a decree rendered in such case would, perhaps, not be open to collateral attack, but would be subject to be set aside on motion, as having been irregularly entered, under the provisions of section 602, *et seq.*, of the Civil Code.

ERROR to the district court for Brown county. Tried below before KINKAID, J.

Uttley & Benedict, for plaintiff in error.

No appearance for defendant in error.

REESE, CH. J.

On the 7th day of September 1883, plaintiff in error instituted an action in the district court of Brown county, against defendant in error, the object of which was a divorce and the custody of minor children. Notice was given by publication, and a decree was rendered as prayed, on the 27th day of November, 1883. The ground alleged in the petition, and upon which the divorce was granted, was that of abandonment. On the 2d day of October, 1886, the defendant filed a motion to set aside the decree. The grounds of this motion were that there was irregularity on the part of plaintiff in obtaining the decree: First, that there was not sufficient proof of publication of notice to give the court jurisdiction; second, that the petition was not filed at the time stated in the notice; third, that the publication of the notice was not in compliance with the requirements of law, and that the time fixed therein for answer was the second Monday after the last publication, instead of the third, as required by section 110 of the Civil Code.

Notice was duly given to plaintiff of the pendency of this motion. On the 7th day of October, 1886, the motion was heard by the district court, and sustained, the court holding that it did not have jurisdiction of the cause at the time the decree was rendered. The decree was therefore set aside. The cause is brought to this court, by plaintiff, by proceedings in error.

No brief has been filed by defendant in error, and it is not quite clear as to the exact legal theory upon which the motion was presented to the district court by defendant in error. But as we view the case as presented by plaintiff in error, the question presented is one of practice. It is insisted by him that in so far as it is sought to vacate the decree of divorce, the application should have been by petition and summons, under the provisions of section 603 of the Civil Code, and not by motion and notice. This question is not entirely free from doubt. Plaintiff contends that, with the exception of that portion of the order which assumes to retain and exercise jurisdiction over the question of the custody of the minor children, as decided in the former decree, that the district court was without jurisdiction, and hence the order setting aside the decree of divorce should be vacated by this court. In the absence of a special provision upon this subject, in the chapter on Divorce and Alimony, we presume the question must be governed by the Civil Code, section 602 of which is as follows:

"A district court shall have power to vacate or modify its own judgments or orders, after the term at which such judgment or order was made: *First.* By granting a new trial of the cause within the time and in the manner prescribed in section three hundred and eighteen. *Second.* By a new trial granted in proceedings against defendants constructively summoned, as provided in section seventy-seven. *Third.* For mistakes, neglect or omissions of the clerk, or irregularity in obtaining a judgment or order. *Fourth.* For fraud practiced by the successful party in ob-

taining the judgment or order. *Fifth.* For erroneous proceedings against an infant, married woman, or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings. *Sixth.* For the death of one of the parties before the judgment in the action. *Seventh.* For unavoidable casualty or misfortune, preventing the party from prosecuting or defending. *Eighth.* For errors in a judgment shown by an infant in twelve months after arriving at full age, as prescribed in section four hundred and forty-two. *Ninth.* For taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment."

Section 603 provides that: "The proceedings to vacate or modify the judgment or order on the grounds mentioned in subdivisions four, five, six, seven, eight, and nine, of the last preceding section, shall be by petition verified by affidavit setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On such petition a summons shall issue and be served as in the commencement of an action," etc.

Upon an examination of these grounds, we are convinced that none of them are applicable to the case at bar. Our attention then is directed to the third subdivision or ground mentioned in section 602, which is, "For mistake, neglect or omission of the clerk, or irregularity in obtaining the judgment or order."

Section 604 provides that: "The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining the judgment or order, shall be by motion, upon reasonable notice to the adverse party or his attorney in the action. The motion to vacate a judgment because of its rendition before the action regularly stood for trial, can be made only in the first three days of the succeeding term."

Section 609 is as follows: "Proceedings to vacate or modify a judgment or order for the causes mentioned in subdivision four, five, and seven, of section six hundred and two, must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant, married woman, or person of unsound mind, and then within two years after the removal of such disability. Proceedings for the causes mentioned in subdivisions three and six of the same section shall be within three years, and in subdivision nine within one year, after the defendant has notice of the judgment."

If, then, this proceeding was properly instituted under the third subdivision of section six hundred and two, we must hold that the proceedings were regular and commenced within the time required by section six hundred and nine. If the decree was rendered without the necessary preliminary proofs, as was found by the district court, upon a hearing, to be the case, and if the time fixed in the notice within which the answer should be filed was not that fixed by statute, it would seem that there was irregularity in obtaining the decree, under the provisions of sections six hundred and three and six hundred and four, and that the court did not err in taking jurisdiction of the motion (the parties having appeared thereto) and vacating the judgment. (See *Huntington v. Finch*, 3 Ohio St. 445; *Downing v. Still*, 43 Mo. 309; *Dick v. McLaurin*, 63 N. C. 185.)

We do not quite agree with the district court in its conclusion that the former decree was rendered without jurisdiction, as the court, no doubt, had jurisdiction of the case; and had the decree been attacked collaterally, it would probably have been held good; but as the course pursued by defendant in error was in conformity with the provisions of the Code, the order of the district court is not open to the objection which might perhaps be made to the recital in the record that no jurisdiction was had.

The decree, therefore, having been rendered without the

defendant being in default, was irregular, and could be vacated on motion. (Freeman on Judgments, section 97; Maxwell's Pleading and Practice, 745.)

The order of the district court is affirmed.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

JAMES H. HAMILTON, PLAINTIFF IN ERROR, v. HORTENSE FLEMING, DEFENDANT IN ERROR.

[FILED MARCH 20, 1889.]

1. Attachment: LEVY ON EXEMPT PROPERTY: PETITION.

Where, in an action against a sheriff for wrongfully selling exempt property under a final process, the petition alleged the seizure, and sale, and the filing of an affidavit with the officer showing the exempt character of the property; that it was exempt; that the plaintiff was a resident of the state, the head of a family, and that she was not the owner of a homestead; and that the property was of a particular value stated in the petition; it was *held*, that the petition stated facts sufficient to constitute a cause of action.

2. ———: ———: RIGHTS OF CLAIMANT: LIABILITY OF OFFICER.

Where, after the levy of an attachment upon exempt property, the defendant filed an affidavit of exemption and inventory of all her property, by which she claimed that the property was exempt under the provisions of section 521 of the Civil Code, and the officer having the process failed to call appraisers or to take any steps to ascertain whether or not the property was exempt, it was *held*, that the decision of the justice of the peace before whom the action was pending, sustaining the attachment, was not conclusive upon the defendant in the action, but that she might maintain replevin, or sue for the value of the property.

3. ———: ———: HUSBAND AND WIFE: RIGHT OF WIFE.

Where the property levied upon consisted of household goods, such as bedding, dishes, bed-clothing, etc., belonging to the wife, and by the departure of her husband, for temporary or permanent pur-

26	940
27	502
28	240
31	464
26	240
40	523
40	819
26	940
43	764
26	240
53	470
26	940
56	424

poses, the maintenance and support of the family devolved upon the wife, she was entitled to the exemption as the head of the family.

ERROR to the district court for York county. Tried below before NORVAL, J.

France & Harlan, for plaintiff in error, cited: *Maxwell's Pl. and Pr.* 301; *Stewart on Husband and Wife*, secs. 14-60; *Snyder v. People*, 26 Mich. 106, 109.

Sedgwick & Power, for defendant in error, cited: *Albrecht v. Treitschke*, 17 Neb. 205; *Neihardt v. Kilmer*, 12 Id. 36.

REESE, CH. J.

The original action in this case was instituted for the recovery from the sheriff of the value of certain personal property levied upon by him by virtue of an order of attachment, and subsequently sold under an order of sale for the satisfaction of the judgment rendered in the principal case. It is contended that at the time of the seizure the property was exempt from execution. Upon a trial being had in the district court, a judgment was rendered in favor of the defendant in error for \$100 and costs of action.

Plaintiff in error brings the cause to this court for review by proper proceedings in error.

The first contention on the part of plaintiff in error is that the petition filed in the district court does not state facts sufficient to constitute a cause of action. This criticism is upon the theory that there was no allegation in the petition that defendant in error was a resident of the state at the time of the issuance of the attachment, nor that she had no lands, town lots, nor houses, subject to exemption as a homestead, nor that the property levied upon was exempt from attachment or execution, nor that defendant in error

had filed an inventory of her personal property with the officer by whom the sale was made.

Upon an examination of the petition, we find that it is alleged that at the time the said order of attachment was levied upon the goods of defendant in error, she was a resident of this state and the head of a family, and not the owner of a homestead, and had filed her inventory of said property with plaintiff in error, and notified him that she selected said property to hold exempt from levy and sale under the laws of this state. While these allegations do not follow strictly the language of the statute, yet they must be held sufficient. There is no allegation in terms that defendant was not the owner of "lands, town lots, or houses, subject to exemption as a homestead," as in section 521 of the Civil Code; but the allegation that she was not the owner of a homestead must be treated, when assailed after verdict, as equivalent to the use of the language contained in the statute. By the section of the Code above referred to, a homestead may consist of lands or town lots with the necessary buildings thereon, or of houses, and they are all included within the term "homestead" as used in the petition; and the averment must be taken as negating the ownership of a homestead of either character.

It is next contended that defendant in error should have replevied the property levied on, or should have appeared before the justice who rendered the judgment under which the seizure was made, and had the property released as being exempt from attachment, and that failing to do so, she had waived her right to bring an action for the value of the property seized and sold. In support of this contention, *State v. Sanford*, 12 Neb. 425, and *State v. Krumpus*, 13 Id. 321, are cited.

The former case was an application for a mandamus to compel the constable to release property which he had levied upon by virtue of an attachment. The writ was denied, upon the ground that the proceeding could not be

Hamilton v. Fleming.

had before judgment, and that in an attachment, an order requiring the constable to call appraisers, would not be issued while the property was held by him under the attachment. The latter case is substantially the same; and neither one seems to go further than to decide that in actions accompanied by attachment proceedings, mandamus will not lie to compel the officer to appraise and relinquish exempt property. These decisions were made by a divided court, and, as the court is at present organized, are not considered good law.

In *People v. McClay*, 2 Neb. 7, and in *State v. Cunningham*, 6 Id. 90, it was held that a writ of mandamus would lie in case of execution, and in the latter case that it would lie in case of attachment. But we do not think the inquiry here presented is material, for the reason that the record shows that the necessary inventory and affidavit were filed, but were not acted upon by the officer.

It is quite probable that the justice of the peace might have ordered the property released, and quite true that the sheriff should have called appraisers as provided by law; but neither was done. Defendant in error might then have instituted an action in replevin for the possession of the property shown to be exempt, (*Mann v. Welton*, 21 Neb. 541,) the proper foundation having been laid therefor. This right is also conferred by section 182 of the Civil Code. The quality of exemption having been fixed upon the property by the filing of the affidavit and inventory, at least so far as it was within the power of defendant in error to fix such quality, she might, perhaps, have maintained an action in replevin for the specific property; and failing to do so, she could maintain her action for its conversion.

It is next contended that the order for the sale of the attached property was a final judgment, and that defendant in error could not ignore it and assert her right to claim the property as exempt; that in such case the remedy of the debtor is to assert the claim of exemption in the court

from which the attachment was issued. While it is no doubt true that where the quality of exemption does not attach to the property under the specific exemption laws, the debtor must pursue the course provided by the statute, as decided in *Mann v. Welton*, *supra*, yet we cannot see that by the failure of the officer to have the property appraised, and the exempt property set off to the claimant, her right to further action could be thus destroyed. In opposition to this view, the case of *State v. Manley*, 15 Ind. 8, is cited. In that case there appears to have been no objection to the attachment of the property before judgment. The defendant in the action appeared, and upon the trial of the principal case, judgment was rendered against him and the attached property ordered to be sold. After the rendition of the judgment and the issuance of the order of sale, and before the sale, the relator demanded that the attached property be set off to him as exempt, which the constable refused to do. The opinion is not clear in its statement of facts, and it does not appear that any legal remedy existed, except that of setting up the claim that the property was exempt from sale, as a defense to the attachment.

It is quite probable that if the right was given to file an inventory as in this state, the right to demand the exempt property was lost, as in *Mann v. Welton*. Under the statutes of this state, governed as we must be by the oft-declared rule that statutes creating exemptions are remedial and must be liberally construed, we do not believe that the defendant's rights were lost by the action of the sheriff in refusing to call appraisers. She complied with the requirements of the law in filing her inventory and affidavit. It was the duty of the sheriff to ascertain as to the exempt character of the property; if so exempt, its further detention was a trespass, and defendant in error would have the right to replevy, or maintain her action for conversion, as she might elect.

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The next question presented is as to defendant in error being the head of the family, within the meaning of section 521 of the Civil Code.

Under the rule stated in *Schaller v. Kurtz*, 25 Neb. 655, there was no error in submitting to the jury and in their finding, that defendant in error was the head of the family to the extent of entitling her to the exemptions. In her affidavit presented to the officer having the writ, she averred that she was the head of the family, and resided with her three minor children, of the ages of three, ten, and twelve years, respectively; that prior to that time her husband had abandoned her, and that the support of the family devolved upon her. In her testimony she testified that at the time of the seizure of the property, her husband was absent, and contributed nothing to her support, although she was at that time expecting remittances from him; that he went away in August prior to the commencement of the suit against her, in December of 1886, first going to Kansas, and afterward to Wisconsin. Had he remained at home, the property would have been exempt to the head of the family, without reference to its ownership, whether by the husband or wife. His departure, whether for permanent or temporary purposes, would not change the rule. The property consisted of feather beds, pillows, bed-spreads, tablecloths, sheets, towels, bed-clothing, napkins, dishes, etc., such as are usually used, and which were used in the family of the defendant in error, and were essential to the comfort of the family. To hold that by the departure of the husband the family would be deprived of the right to hold such property, would in effect destroy the beneficent purpose of the exemption laws. (*Frazier v. Syas*, 10 Neb. 115.) Some objection is made to the instructions given to the jury by the trial court, but as they are consistent with the views here expressed, they need not be noticed. We see no error in them.

The last contention of plaintiff in error which we will

notice, is that the damages awarded were excessive, and that the evidence does not support the amount for which the jury found a verdict.

There were four witnesses examined as to values. Defendant in error testified to the values of the various articles, making a total valuation of \$140.50. Three witnesses were called by plaintiff in error, two of whom testified that the goods were worth \$35.00, and one that they were worth \$45.35. The verdict of the jury seems not to have followed the testimony of any of the witnesses as to value. It was evidently a compromise verdict, although not so shown by any direct evidence. A considerable portion of the property was shown to be old and badly worn, and it is probable that had it all been new, or substantially so, at the time of its seizure, it would have been worth the amount fixed by the verdict of the jury, or, perhaps, by the testimony of defendant in error. But such was not the case. Under all the evidence as to the quality of the property, and its condition at the time of the levy, we are impressed with the belief that the verdict was for more than it should have been. For that reason, the judgment of the district court will be reversed unless defendant in error remit from the judgment the sum of \$30.00 within thirty days from the date of the filing of this opinion. In case of the remittitur being filed, the judgment of the district court will be affirmed.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

W. V. MORSE & CO., APPELLANTS, V. CATHERINE
ENGLE ET AL., APPELLEES.

[FILED APRIL 3, 1889.]

PRACTICE: APPEAL AND ERROR. An action at law, or a final order in any special proceeding therein, can be reviewed only on error; but an action in equity, or any special proceeding therein in the nature of a final order, may be reviewed on appeal.

MOTION to dismiss appeal.

Agee & Stevenson, and C. B. Kellar, for the motion.

Hainer & Kellogg, and J. H. Smith, contra.

MAXWELL, J.

The original action in this case was brought by the plaintiffs against the defendants in the district court of Hamilton county, to foreclose a mortgage of real estate, and a decree was duly rendered. The defendants thereupon obtained a stay of order of sale, and about the time of the expiration of the same, instituted a proceeding to vacate the decree, for reasons which need not be here stated. The defendants thereupon appealed to this court, the transcript being filed March 13, 1888, and notice waived. On March 13, 1889, a motion to dismiss because the order was not appealable, was filed, and is now submitted to the court.

In support of the motion, the case of *Iler v. Darnell*, 5 Neb. 192, is cited. That was an action at law in which a petition for a new trial under the statute had been sustained, and the court held that it was not an action, but a special proceeding in an action, and in effect that the rules govern-

ing a review of the action itself controlled a special proceeding therein relating to the trial of the action.

This we think is a correct statement of the law, and we adhere to it.

Sec. 581 of the Code of Civil Procedure provides that: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title.

"Sec. 582. A judgment rendered or final order made by the district court may be reversed, vacated, or modified, by the supreme court, for errors appearing on the record."

Sec. 675 provides: "That in actions in equity either party may appeal from the judgment or decree rendered or final order made by the district court, to the supreme court of the state; the party appealing shall within six months after the date of the rendition of the judgment or decree, or the making of the final order, procure from the clerk of the district court and file in the office of the clerk of the supreme court, a certified transcript of the proceedings had in the cause in the district court, containing the pleadings, the judgment or decree rendered or final order made therein, and all the depositions, testimony, and proofs, offered in evidence on the hearing of the cause, and have the said cause properly docketed in the supreme court; and on failure thereof, the judgment or decree rendered, or the final order made in the district court, shall stand and be proceeded in as if no appeal had been taken."

This, in our view, applies to all appealable orders in an action in equity, and includes that under consideration. The rule seems to be that where the action is at law to review the action itself, or a final order in any special proceeding therein, the proper practice is by petition in error; but where the action is in equity, the decree itself, or any

Bell v. Templin.

special proceeding in the action being a final order, may be reviewed on appeal.

The motion to dismiss the appeal must be overruled.

MOTION OVERRULED.

THE other Judges concur.

26	249
33	767

T. T. BELL, PLAINTIFF, V. JOHN W. TEMPLIN, DEFENDANT.

[FILED APRIL 3, 1889.]

Election Contest: JURISDICTION. A county attorney is a county officer, and the county court of the proper county has original jurisdiction in a proceeding to contest the election of such attorney, and the supreme court has not original jurisdiction.

ORIGINAL proceeding to contest election of defendant as county attorney of Howard county.

Darnall & Kendall, for plaintiff.

Henry Nunn, Talbot & Bryan, and *John W. Templin*, for defendant.

MAXWELL, J.

The plaintiff and defendant were candidates for the office of county attorney of Howard county, at the general election held November 6, 1888, and the defendant was declared to have a majority of the votes cast and to be elected. The plaintiff has brought an original action in this court to contest said election. The defendant demurred to the petition on the ground of want of jurisdiction.

Sec. 2, art. VI, of the Constitution, provides that: "The supreme court shall consist of three judges, a majority of whom shall be necessary to form a quorum, or to pronounce

a decision. It shall have original jurisdiction in cases relating to the revenue, civil cases in which the state shall be a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law."

Section 69 of chapter 26, Compiled Statutes, provides that: "The supreme court shall hear and determine contests of the election of judges of the supreme court, judges of the district courts, district attorneys, and regents of the university; and in case they shall disagree, the governor shall act with them in determining the contest; but no judge of the supreme court shall sit upon the hearing of any case in which he is a party.

"Sec. 70. The district courts of the respective counties shall hear and determine contests of the election of county judge, and in regard to the removal of county seats, and in regard to any other subject which may by law be submitted to the vote of the people of the county; and the proceedings therein shall be conducted as near as may be hereinafter provided for contesting the election of county officers.

"Sec. 71. The county courts shall hear and determine contests of all other county, township, and precinct officers, and officers of cities and incorporated villages within the county."

In 1885 the legislature passed an act to provide for county attorneys, which declares:

"Sec. 15. That at the general election in 1886, and every two years thereafter, a county attorney shall be elected in each organized county, for judicial purposes, who shall hold his office for the term of two years and until his successor is elected and qualified; who shall, before he enters upon the duties of said office, execute a bond to the state of Nebraska, in a sum not less than one thousand dollars, to be fixed by the county board, with two or more good and sufficient sureties, to be approved by said board, which bond shall be conditioned for the faithful performance of his duties as such officer, and that he will pay over to the

county treasurer, in the manner prescribed by law, all moneys which shall come into his hands by virtue of his office, and shall file said bond in the office of the county clerk, and the same shall be recorded in the proper records of the said county.

"Sec. 16. It shall be the duty of the county attorney to appear in the several courts of their respective counties and prosecute and defend, on behalf of the state and county, all suits, applications, or motions, civil or criminal, arising under the laws of the state, in which the state or the county is a party or interested."

"Sec. 26. That whenever the term district attorney or prosecuting attorney appears in the laws of Nebraska, it shall hereafter mean county attorneys; and all laws now in force regulating the duties of district attorneys in criminal matters and proceedings, shall apply to county attorneys herein provided for."

Under the act of 1885 the office of district attorney was abolished and that of county attorney created. The office of county attorney is a county office, and in contesting an election for such office, the same tribunal has jurisdiction as if the office contested was that of sheriff or clerk. It is the policy of our law to require trials of this kind to take place in the county where the cause of action accrues, and where the witnesses may be brought before the tribunal and the testimony taken without unnecessary inconvenience or expense. Where, however, the district comprises a number of counties, or the entire state, it is necessary to provide a tribunal with wider powers than is possessed by the tribunal spoken of in either section seventy or seventy-one of chapter twenty-six, Compiled Statutes; hence it is sought to confer this power on the supreme court. The supreme court undoubtedly has power in actions of quo warranto and probably in a proceeding to contest an election in any of the cases mentioned in section sixty-nine, chapter twenty-six. The original jurisdiction of the supreme court in

judicial proceedings is fixed by sec. 2, art. 6 of the Constitution, and is limited to cases relating to the revenue, mandamus, quo warranto, habeas corpus, and cases in which the state shall be a party. The designation of these cases in which the court has original jurisdiction is a direct prohibition of jurisdiction in other cases. The maxim, "*Expressio unius est exclusio alterius*," applies, and excludes original jurisdiction in other cases. The supreme court is intended as a court of review, the principal business being a reëxamination of the judgments of the district courts. The original jurisdiction is conferred on this court in a limited number of cases to enable the court to protect the rights of parties where other means would seem to be inadequate, and to prevent a failure of justice. A tribunal to determine contested elections need not be, strictly speaking, a judicial body, the powers exercised being *quasi* political and administrative. (*State v. Oleson*, 15 Neb. 247; *State v. Saline County*, 18 Id. 428.) There is but little doubt, therefore, that the legislature may constitute the supreme court a tribunal to decide contests of election in cases where officers are elected by the entire state, or by a number of counties constituting a district thereof. This question, however, does not arise in this case, as a county attorney is a county officer; and while he performs within his county the same duties as were required of a district attorney in such county, and the language of the statute has been so modified as to confer the same powers upon the county attorney as were formerly possessed by a district attorney, yet, in proceedings to contest the election, as in all other matters, he is a county officer, and the county court has original jurisdiction of the case. This court therefore has no original jurisdiction, and the demurrer must be sustained and the action dismissed.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

FRANK SOUTHARD AND JULIUS NEWMAN, PLAINTIFFS
IN ERROR, V. HIRAM A. BRYANT, DEFENDANT IN
ERROR.

[FILED MARCH 20, 1889.]

Guaranty: CONSIDERATION. In an action upon a guaranty where the defendants had pleaded want of consideration, and also an agreement between a husband and wife who had separated, that the guaranty was given in consideration that the husband would not molest nor disturb his wife, which contract he had broken, *held*, there being doubt as to the true consideration of the contract, that the court erred in not admitting evidence tending to sustain the allegations of the answer.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Winter & Kauffman, for plaintiff in error, cited: *Sears v. Brink*, 3 Johnson, 214; *Rogers v. Kneeland*, 10 Wend. 250; *Kerr v. Shaw*, 13 Johns. 236; *Taylor v. Pratt*, 3 Wis. 674; *Saunders v. Wakefield*, 4 Barn. & Ald. 595; *Fish v. Hutchinson*, 2 Wils. 94; *Anderson v. Hayman*, 1 H. Black. 121; *Emerick v. Sanders*, 1 Wis. 79, and cases therein cited.

A. D. McCandless, for defendant in error, cited: Code, sections 381, 382.

MAXWELL, J.

The defendant in error recovered a judgment in the court below against the plaintiffs in error, upon the following agreement of guaranty:

“WYMORE, NEB., April 26, 1887.

“We hereby promise and agree to release and defend H. A. Bryant on a certain mortgage held by A. Q. Smith

against said Bryant's team of horses in case of A. Q. Smith to ever collect said mortgage.

"[Signed]

FRANK SOUTHARD.

"JULIUS NEWMAN."

Frank Southard in his answer alleges: First, that the horses referred to belonged to Lillie Bryant, the wife of the defendant in error; second, that the defendant in error, upon the separation, kept all the joint property of himself and wife; third, that there was no consideration for the agreement; and fourth, "that said written agreement was given as a part of executory contract of separation between Hiram A. Bryant and Lillie Bryant, husband and wife. Said contract was entered into by and between Hiram A. Bryant and defendant Frank Southard, brother and trustee of Lillie Bryant, for that purpose, the terms of which agreement were that said husband and wife should live wholly separate and apart; that said plaintiff should forever cease to communicate with, harass, or in any manner to molest and disturb said Lillie Bryant; and that said plaintiff should leave Gage county and not return thereto. Plaintiff has wholly refused and failed to perform his part of said agreement; but, on the contrary, has repeatedly attempted to interfere with said Lillie Bryant, and has written scandalous and libelous letters to her, charging her with immoral conduct, and repeating to her vile rumors concerning her in a libelous and malicious spirit, and threatening her brother with arrest on a charge he proposed to bring under the criminal laws of this state; wherefore the consideration for said written agreement has wholly failed."

In support of this answer, the plaintiffs introduced the deposition of Frank Southard, who testified as follows:

Q. State fully the manner in which you came to sign the instrument given to H. A. Bryant, which he sues on in this action.

A. My sister, Lillie Bryant, had finally decided to leave Bryant, and being apprehensive of future annoyance and

Southard v. Bryant.

molestation by him, she was willing for him to keep her team of horses if he would agree to leave her entirely alone; so I signed it.

Q. What promise or agreement did Bryant make and covenant to keep as a consideration for your signing said instrument?

A. Bryant then agreed most positively that if we, that is, J. Newman and myself, would sign the instrument sued on in this action, he would neither speak to, visit or write to my sister, or attempt to do either for all time to come.

Q. Did he fulfill his said agreement?

A. Not at all; nor does he pretend to keep it.

Q. What consideration, if any, have you ever received from Bryant, or any one for him, for signing the said instrument?

A. None whatever.

Q. Did Lillie E. Bryant, or any one for her, at the time of the settlement and division of property between H. A. Bryant and herself, receive any of said property or any consideration whatever from said Bryant or any one for him, for her said team, or for the instrument given said Bryant which is herein sued upon?

A. None whatever.

The cross examination drew out no new facts. In support of the alleged contract, the defendants below (plaintiffs in error) offered on the trial to prove by the witness Edward Southard, father of Lillie Bryant, "the breach and utter failure to perform the contract of non-interference and non-molestation of Mrs. Bryant, by the plaintiff, Hiram A. Bryant, in consideration for which and which defendants allege was the sole consideration of the undertaking given to H. A. Bryant by Frank Southard and Julius Newman, upon which this action is brought." This was excluded, to which the defendants below excepted, and now assign the same for error.

The alleged contract of non-interference is set up in the answer and testified to by Frank Southard, one of the plaintiffs in error, and the facts in relation to the breach of it should have been submitted to the jury. The testimony tends to show that the defendant in error and Lillie Bryant are husband and wife, and had been for some time prior to the making of the contract upon which the suit is brought, and that they kept a boarding-house. For some cause, which does not appear in the testimony, they separated, and divided the property. There is but little testimony as to the ownership of the joint property; that is, whether purchased by husband or wife; but we are led to infer that nearly all of the property held by them had been purchased and paid for by the wife. The horses were apparently owned by her, and the chattel mortgage referred to in the guaranty was executed by her. The testimony tends to show that the husband and wife divided the property; but how it was divided—that is, what articles were taken by each—does not appear. The horses, however, were taken by the husband, and the guaranty executed about that time. Whether this guaranty was given in consideration of certain property taken by the wife, or, as claimed by the plaintiffs in error, on an independent contract between the husband and wife that he should not molest her, the testimony leaves it uncertain. In an action between the original parties to an agreement, the consideration may be inquired into, and a contract without consideration, or based on an illegal one, ordinarily cannot be enforced. It is evident that the facts have been but partially made to appear in this case, and no doubt they can be fully developed on the next trial. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other Judges concur.

THOMAS J. MCNAIR, GEORGE W. MERRILL, AND WILBER I. CRAM, PLAINTIFFS IN ERROR, V. THE STATE OF NEBRASKA, EX REL. AMANDA J. POWERS, DEFENDANT IN ERROR.

26	257
47	356
96	257
55	4

[FILED APRIL 4, 1889.]

1. **Roads: SECTION LINES.** Under the provisions of section 46 of chapter 78 of the Compiled Statutes, entitled roads, section lines are declared to be public roads established by act of law, subject to be opened by the county board when the public good requires it. The order of the county board declaring a section line to be a public highway, or establishing a line of road thereon and ordering it to be opened by survey by the county surveyor, is an establishment of a public highway on such line which can only be vacated by pursuing the course designated in said chapter.
2. ———: ———: **VACATION.** An order of a county board afterwards made declaring such highway "no road," for the reason that the public good does not justify the expense, without any proceedings, by petition or otherwise, by which they could obtain jurisdiction, *held*, void.

ERROR to the district court for Loup county. Tried below before HARRISON, J.

A. *M. Robbins*, for plaintiffs in error.

A. *S. Moon*, for defendant in error.

REESE, CH. J.

This was an application to the district court for a peremptory writ of mandamus to the board of county commissioners of Loup county for the purpose of compelling them to vacate an order made by them on the 4th day of October, 1887, declaring a section-line road previously ordered open, "no road, for the reason that the public good does not justify the expense."

It was alleged in the relation that the plaintiffs in error were the board of county commissioners of Loup county, McNair being chairman; that on the 12th day of October, 1886, Caleb Jeffers, Thomas J. McNair, and Wilber I. Cram, constituted the board, Jeffers being chairman; that on that day at a regular session of the board, the following proceedings were had and duly entered of record:

On motion of Cram it was voted to establish a certain line of road on section line, as follows: Commencing on the northwest corner of section thirty-six, township twenty-one north, of range eighteen west; running thence east to the northeast corner of section thirty-two, township twenty-one north, of range seventeen west; and the county clerk is hereby instructed to notify the county surveyor to perpetuate the existing government corners along the line of said road by planting monuments of some durable material, with suitable witnesses, whenever practicable, and make a record of the same; that on the 16th day of October, 1886, the county clerk of Loup county notified the county surveyor, as instructed by the county board, and on the 5th day of May, 1887, the county clerk caused to be published in a weekly paper published in Loup county, a notice to land owners, notifying them as to the location of said road, said notice being published four consecutive weeks; that said road was included in road district No. 1 of Loup county; that Robert A. Woods was road overseer of said road district No. 1; and that on the 14th day of May, 1887, the county clerk of Loup county notified said Robert A. Woods of the establishment of the above-described line of road, and directed said Woods to have said road opened and worked; that at various times during the summer said Woods caused portions of said road to be opened, expending in so doing a large amount of labor; that on and before the 15th day of July, 1887, the limit of the time set for the filing of remonstrances, no objections were filed in reference

to the above-described road; and that between the 8th day of June and the 13th day of July, 1887, claims for damages were filed, a part of which were allowed by the appraisers appointed to assess the same; that on the 4th day of October the plaintiffs in error unlawfully vacated said road, without being petitioned by any voter, giving as the reason that the public good does not justify the expense; that the public good does require that said section lines be opened and worked as other public roads; and this the board of county commissioners refuse to order.

An alternative writ of mandamus, containing substantially all the allegations of the petition, was issued. To the petition and writ, plaintiffs in error demurred, assigning as grounds thereof the following:

"1st. Plaintiff has not legal capacity to sue.

"2d. Because there is a defect in parties plaintiff.

"3d. Because the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendants.

"4th. Because the petition shows that the defendant had exhausted all power on them conferred."

The demurrer was overruled by the district court, and plaintiffs in error refusing to answer or plead further, but electing to stand on the demurrer, a peremptory writ was allowed. Plaintiffs in error bring the case to this court by proceedings in error.

It is contended by plaintiffs in error that mandamus is not the proper action, there being a plain and adequate remedy in the ordinary course of the law, by proceedings in error from the action of the county board declaring the road "no road;" and in support of this, *The People, ex rel. Nye, v. Martin*, 4 Neb. 49, is cited. While upon the other hand it is contended that the proceedings referred to are void, and that it is the duty of the board to vacate the same and allow the road to be opened and worked in accordance with their previous order.

The case of *The People v. Martin* was where, in an election contest case, the justices of the peace who had been selected to try the contest excluded certain testimony which the relator produced and considered material to his case; and it was sought to compel the justices to reassemble as a board, receive the testimony rejected, and reduce it to writing as required by the statutes.

It was held that the writ could not issue, for the reason that the relator was given the right to appeal, by statute, and that that was the proper remedy.

In that case the justices of the peace were acting in a matter then pending before them, and of which they had jurisdiction and authority to act. In this case it is insisted by defendant in error that nothing was pending before the county board, the road having been previously established, and that the proceeding referred to was a nullity.

It is further insisted by plaintiffs in error, upon the authority of *Throckmorton v. State*, 20 Neb. 653, that the opening of the section-line roads by the county board, is a matter of judicial discretion, with which a court cannot interfere by mandamus.

There is no doubt but that the matter of opening section-line roads is left to the discretion of the various county boards, by section 46 of chapter 78 of the Compiled Statutes, as decided in the case referred to; but the important question here is, whether or not there was any judicial discretion to be exercised at the time of making the order complained of. As was alleged in the petition and writ, this jurisdiction and discretion were exercised on the 12th day of October, 1886, when the line of road was established, and the proper orders were made requiring it to be thrown open and prepared for public use. But it is contended that before the county board can legally make such order, they must find that "the public good requires" the opening of the road, as provided in the section above referred to.

McNair v. State.

This is no doubt true ; but we know of no law which requires such finding to be entered upon the records of the county ; and even were it necessary, it is quite probable that the order would be voidable only, to be reviewed upon error, and would not be open to collateral attack. (*Hansen v. Bergquist*, 9 Neb. 269.)

However, under the well-known rule of law that in matters before inferior courts their proceedings will be construed with great liberality, (*Haggard v. Wallen*, 6 Neb. 271,) and that all presumptions are in favor of the regularity of their proceedings, except as to jurisdiction, it must be presumed that the necessary facts were found by the board.

By section 46 of chapter 78, above referred to, section lines are declared to be public roads, subject to be opened by the direction of the county board whenever the public good requires it. The road was established by act of law under the provisions of this section. It only remained for the county board to order the same open, which they did on the 12th day of October, 1886, as shown by the petition, and which is admitted by the demurrer.

The overseer of the road district was directed to open and work the road, and in pursuance of such direction he caused a portion of the road to be opened and worked. By this the section line was made as much a public highway as any established road in the county. It had passed beyond the jurisdiction of the county board, and was no more subject to their control than any other legally-established public highway. Its vacation could be effected only by pursuing the course provided for in section 4 of the road law, and in no other way could the county board acquire jurisdiction for that purpose. Their declaring that it was "no road" was simply void, and did not effect the legal status of the highway. It is the duty of the overseer of roads of the district wherein the road is located, to pro-

ceed in opening the road the same as if the action complained of had not been taken by the county board.

The decision and judgment of the district court requiring the county commissioners to cancel the order referred to, was correct and is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

JOHN L. EVERSON, PLAINTIFF IN ERROR, V. GEORGE GRAVES, OLE EVERSON, AND THOMAS EVERSON, DEFENDANTS IN ERROR.

[FILED MARCH 20, 1889.]

1. **Trial: VERDICT.** Where a cause was submitted to a jury upon the demand of a plaintiff and cross-demand of a defendant, and the jury returned a verdict in favor of the plaintiff, but showing an allowance of a part of the defendant's set-off, it was not error on the part of the district court to refuse to order the jury to retire and return in their verdict the amount allowed to the defendant on his set-off.
2. ———: ———: **REMITTITUR.** The evidence examined, and the verdict found to be excessive; and in default of the filing of a remittitur, judgment to be reversed. In case such remittitur is filed, the judgment to be modified and affirmed.

ERROR to the district court for Stanton county. Tried below before POWERS, J.

H. C. Brome, for plaintiff in error.

W. W. Young, and *M. McLaughlin*, for defendant in error.

REESE, CH. J.

Defendants in error instituted this action for the purpose of recovering the amount due upon two promissory notes, one dated September 18, 1876, for \$100, with interest at twelve per cent, upon which credits had been indorsed to the amount of \$70, and one note dated September 18, 1876, for \$200, with interest at twelve per cent, and upon which the sum of \$106.75 had been credited. The notes were signed by plaintiff in error, with Ole Everson and Thomas Everson as sureties.

Plaintiff in error filed his answer, by which he admitted the execution of the notes and presented a set-off, consisting of various items, amounting in all to the sum of \$798.15. The items constituting the set-off need not be here set out.

Defendants in error filed their reply, admitting a portion of the set-off presented by plaintiff in error, but alleging that the same were fully paid and satisfied by them on the 20th day of September, 1880. All other allegations of the answer were denied.

A jury trial was had which resulted in a verdict in favor of defendants in error, who were plaintiffs below, for the sum of \$269.50. Upon the return of the verdict, plaintiff in error excepted to the form of the verdict, for the reason that it did not find the amount allowed the defendants upon the set-off, and moved the court that the jury be required to correct the verdict in this respect, which motion was overruled, and which ruling is now assigned for error.

It is contended that by the verdict, the jury should have found specially the amount allowed to plaintiff in error, and deducted the same from the notes and interest thereon, as well as finding the balance due to defendants in error.

Section 292 of the Code provides that: "The verdict of the jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of

the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds facts only," etc.

The verdict in this case was general, finding for the plaintiff and assessing the amount of his recovery. While the form of the verdict contended for by the plaintiff in error is a proper one, yet we think the verdict in this case meets all the requirements of the statute; and had plaintiff desired a special finding of the amount due him from defendants in error, the proper time to have made the request would have been at the time of the submission of the case to the jury. He could not be permitted to wait until the return of the verdict, and after ascertaining its contents insist upon a different finding or form of verdict. At any rate there was no such abuse of discretion as will require a reversal of the judgment.

The next contention of plaintiff in error is that the verdict was not sustained by sufficient evidence, and that it was contrary thereto. This involves an examination of the whole case, and of the testimony introduced, which was quite unsatisfactory and indefinite. Upon a careful examination of the evidence, we conclude that there was sufficient to sustain a verdict in favor of defendants in error, but that, by a miscalculation, perhaps, it was for more than was warranted by the proof. At the time of the trial, the amount due on the two notes upon which plaintiff's action was based, was \$419.78. The verdict being for \$269.50, shows a finding in favor of plaintiff in error upon his set-off of \$150.28. Among the items presented in the set-off were: "Herding cattle during a part of the months of September and October, \$121; sale of cattle for defendants in error, \$25; corn-fodder, \$10; cash paid to Mills, \$4.40. It was claimed by defendants in error that all matters of difference between plaintiffs and defendant were settled, and a balance struck, prior to the commencement of the suit; but it is shown that these

particular items were not included in such settlement, the testimony of defendants in error showing that such a claim was not presented, and therefore not paid. There is some dispute as to the character of the alleged settlement, and it is quite probable, judging by the testimony, that it was not intended by both parties as a full and complete adjustment of all differences between them. It also appears by the testimony of defendants in error, that the agreement between the parties was that the cattle referred to, some one hundred and sixty in number, were to be wintered for \$3.00 per head, defendants in error furnishing the grain, and that nothing was said about the care of the stock prior to the commencement of the feeding season. The cattle were placed in charge of plaintiff in error early in the month of September, which was shown to be about one month before the feeding season. It seems quite probable that the jury made an allowance for this labor, but that in estimating its value they were governed more by their own judgment than by the proof. While it is insisted on the part of defendants in error that the charge was more than the labor was worth, yet no evidence was tendered to show what would have been a reasonable charge; while plaintiff in error testified that it was worth the sum charged. The testimony of plaintiff in error upon the matter of selling cattle, was that defendants in error directed him to sell them for a certain price, and offered to allow him for his trouble all in excess thereof that he could obtain; that he sold them for \$25 more than the price fixed, taking a note therefor which he delivered to the defendants in error, and which was afterwards paid, and for which no return had been made to plaintiff in error. The item of torn-fodder, \$10, and cash to Mills, \$4.40, are admitted by defendants in error; but they insist that these were included in the settlement referred to. This, however, is denied by plaintiff in error, and under circumstances which render it probable that defendants in error were mistaken as to these

particular items. The interest upon these items would amount to \$72, making a total of \$232.40, which should have been allowed to plaintiff in error. This deducted from the \$419.78, would leave \$187.38 due defendants in error, instead of the \$269.50, for which the verdict was returned.

The judgment of the district court will, therefore, be reversed and the cause remanded, unless defendants in error remit the sum of \$82.12 within thirty days from this date. In case such remittitur is filed, the judgment will be modified to that extent, and judgment for \$187.38 will be entered in this court.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

26	266
36	346
26	266
40	837
26	266
48	379

FEDER, NUSBAUM & CO., PLAINTIFFS IN ERROR, V. SOL-
OMON & NATHAN, DEFENDANTS IN ERROR.

[FILED APRIL 11, 1889.]

Attachment: Defendants in error, having met with a heavy loss by fire, were unable to meet their obligations, and having executed chattel mortgages upon their stock of merchandise in favor of a bank and others, plaintiffs in error procured an attachment and attached said stock, alleging in the affidavit therefor, that "defendants are about to sell, convey and otherwise dispose of their property, with the fraudulent intent to defraud and cheat their creditors, and to hinder and delay them in the collection of their debts, and have sold, conveyed, and otherwise disposed of their property, with the fraudulent intent to cheat and defraud their creditors, and to hinder and delay them in the collection of their debts." Upon their motion to dissolve the attachment, heard before the district judge at chambers, the questions were: (1) Whether there was an immediate delivery of the goods to the mortgagee, under the mortgage to the bank, followed by a continued change of possession. (2) Whether said mortgage was made in good faith, and not for the purpose of hindering or de-

Feder, Nusbaum & Co. v. Solomon & Nathan.

laying creditors. *Held*, That such questions are questions of fact; and that the decision of said judge upon said motion being sustained by sufficient evidence, it will be upheld.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

Montgomery & Jeffrey, for plaintiff in error, cited: *Robison v. Uhl*, 6 Neb. 328; *Brunswick v. McClay*, 7 Id. 137; *Turner, Frazer & Co. v. Killian*, 12 Id. 580; *Severance v. Leavitt*, 16 Id. 439; *Currie et al. v. Knight et al.*, 34 N. J. Eq. 485; *Wallen jr. v. Rossman, Sheriff*, 45 Mich. 333; *Fearey v. Cummings*, 41 Id. 376; *Hedman v. Anderson*, 6 Neb. 392; *Doyle v. Stevens*, 4 Mich. 87; Bump on Fraudulent Conveyances, 3d Ed., 136; *Densmore v. Tomer*, 14 Neb. 393; *Doyle v. Stevens*, 4 Mich. 87; *Cahoon v. Marshall*, 25 Cal. 201; *Billingsley v. White*, 59 Pa. St. 464; *Cutting v. Jackson*, 56 N. H. 253; *Mead v. Noyes*, 44 Conn. 487.

M. A. Hartigan, for defendant in error, cited: *Morrow v. Reed*, 30 Wis. 81; *Janvrin v. Fogg*, 49 N. H. 340; Jones on Chattel Mortgages, secs. 176, 190, 336; *Thash v. Norment*, 5 Mo. Appeals, 545; Bump on Fraudulent Conveyances, 3d Ed., p. 603; Waples on Attachments, pp. 425, 426, 427, 428, and authorities cited; *Seidentopf v. Annabil*, 6 Neb. 524; *People v. McAllister*, 19 Mich. 215, 217.

COBB, J.

On the 10th day of May, 1888, the plaintiffs in error commenced an action in the district court of Cass county, to recover from the defendants in error the sum of \$933 upon an account for merchandise sold and delivered, upon which account the sum of \$425 was, at the commencement of the action, past due, and the sum of \$508 was to become due on the 15th day of May, 1888. At the same time the plaintiffs in error filed in said action an affidavit

for an attachment, alleging, as their grounds therefor, that defendants "have sold, conveyed, and otherwise disposed of their property, with the fraudulent intent to cheat and defraud their creditors, and to hinder and delay them in the collection of their debts; and that said defendants are about to sell, convey, and otherwise dispose of their property, with the fraudulent intent to cheat and defraud their creditors, and to hinder and delay them in the collection of their debts."

On the 9th day of August, 1888, the defendants in error filed their motion to vacate the plaintiff's order of attachment, and discharge the same for the reasons:

1. That the court had no jurisdiction to make the order from the records presented.

2. That the affidavit on which the order was granted, states no fact or facts justifying an order of attachment.

3. That there was no bond given as required by law, the indebtedness shown as \$933 and the bond for \$1,666.

4. That the order of attachment was improvidently granted.

5. That the allegations of the affidavit, on which the attachment was sought, are false and untrue.

6. That at the date of the suing out of the attachment, the plaintiffs had already commenced, and there was pending, an action between the parties for the recovery of the same indebtedness upon which orders of attachment had been issued and lands seised, in the district court of Smith county, in the state of Kansas, sufficient to pay the debt, which action is still pending and in no manner released.

On the 22d day of August following, this motion was argued and heard before the district judge of Cass county, and it was ordered that the attachment heretofore granted be vacated and discharged, and the sheriff ordered to return all the property taken under the attachment, and the garnishee released from all liability in this action.

To the order of the court sustaining the motion and dis-

charging and vacating the attachment and order of garnishment, the plaintiffs except, and bring the cause to this court on the following assignments of error:

1. The court erred in sustaining the motion to discharge the attachment.

2. In ordering that said attachment be vacated and discharged.

3. The order vacating and discharging said attachment is not sustained by the affidavits filed to support the same.

The first, second, third, and fourth grounds of defendants' motion, on which the plaintiffs' order of attachment was dissolved, was doubtless abandoned before the district judge. The third was based upon a mistake of fact, the ground of objection therein against the bond being untrue.

As to the sixth ground of objection, without expressing an opinion upon the point, I deem it sufficient to say that the evidence introduced to establish it, fails to show that the proceedings in Smith county, Kansas, had been commenced or were pending at the time of the commencement of these proceedings here sought to be dismissed.

The fifth point was the only one argued at the bar of this court, and to it our discussion will be confined.

The allegations of the affidavit for attachment, called in question and put in issue by the fifth ground of the motion, are that the defendants are about to sell, convey, and otherwise dispose of their property, with the fraudulent intent to defraud and cheat their creditors, and to hinder and delay them in the collection of their debts, and have sold, conveyed, and otherwise disposed of their property, with the fraudulent intent to cheat and defraud their creditors, and to hinder and delay them in the collection of their debts.

It is not contended by the plaintiffs in the argument that the defendants were about to make, or contemplated making, any other or further disposition of their property than that which they had already made by the execution of the chattel mortgages.

Our attention will therefore be confined to the legal effect of the chattel mortgages previously executed, and placed on file on the day previous to that on which the order of attachment was issued. Was that disposition fraudulent, and made by the defendants with intent to cheat and defraud their creditors, and to hinder and delay them in the collection of their debts? Much of the argument of the plaintiffs, in their brief, is directed to the character and legal effect of the disposition of the goods by these chattel mortgages, considering the transaction before the recording of the mortgages. I do not consider it necessary to follow this part of the argument, for it is admitted that before the commencement of the action, before the filing of the affidavit, and before the allowance and issuance of the order of attachment, the mortgages had been placed on file.

The case therefore does not come within the provision of section 14, chapter 32, of the Compiled Statutes, but must be construed in reference to the provisions of section 11 of said chapter, that: "Every sale made by a vendor, of goods and chattels in his possession or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud; unless it shall be made to appear on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers."

The question is, therefore, whether the sale or assignment of said goods and chattels by way of mortgage or security, was accompanied by an immediate delivery and followed by an actual and continued change of possession of the

things sold, mortgaged, and assigned, or whether it was made to appear at the hearing of said motion that the same was made in good faith without any intention to defraud the creditors of the defendants. If upon the execution and delivery of said chattel mortgages the same was accompanied by immediate delivery, and followed by an actual and continuous change of possession of the mortgaged property, such mortgage and transfer must be presumed to have been made in good faith, and the burden of proving it to have been made with fraudulent intent rests upon the plaintiffs. But if there was no such immediate delivery followed by an actual and continued change of possession, it was incumbent on the defendants or those claiming under such sale or assignment to make it appear that the same was made in good faith and without intent to defraud the creditors of the defendants.

The evidence presented to the district judge upon the hearing of the motion to dissolve the attachment, was directed primarily to the question of the immediate delivery and the actual and continued change of possession of the goods, but might have been, and probably was, considered by him also as bearing upon the question, whether the sale or assignment was made in good faith, and without any intent to defraud any of the creditors.

The defendants presented the affidavit of the defendant Isaac Nathan. In this testimony, the affiant, after setting forth facts and circumstances concerning the defendants' business at the city of Plattsburgh, and at the town of Fairmont, states that their losses by fire at Fairmont amounted to \$30,000, on which there was an insurance of \$10,000, and no more; that their stock of goods at Plattsburgh amounted to about \$12,000, which, with the amount of the insurance on that lost by fire, constituted their only available assets to meet an indebtedness of \$33,000; that their creditors, becoming alarmed, began to urge an immediate settlement and payment; that among

their creditors was the First National Bank of Plattsmouth, and to secure said bank, their firm made and delivered its notes and mortgage to cover the amount due of \$5,000; that among the servants and clerks who had served the firm honestly and faithfully for more than ten years, was James Finley, to whom they made and delivered their mortgage in good faith for full value in the sum of \$500; that among those who had loaned and advanced money to the firm were Fannie Nathan and Lee Sanders, to whom were executed mortgages in good faith and for full value; that after the execution of the mortgage to the bank, its officers demanded, as a precaution, possession of the stock of goods so mortgaged, and affiant gave them possession, and they proceeded to sell the same and apply the proceeds to the liquidation of their claims; that the same was done in good faith to pay and discharge a just indebtedness. Affiant says, in conclusion, that he, nor any person for his firm, never intended nor attempted nor has he nor they ever entertained an intent or purpose to sell, convey, or otherwise disposed of their property, with fraudulent intent to cheat or defraud their creditors, nor to hinder or delay the collection of their debts; and that they have not sold, conveyed, nor otherwise disposed of their property, with fraudulent intent to cheat or defraud their creditors, nor to hinder or delay them in the collection of debts.

They also presented the affidavit of M. A. Hartigan, who testified that he was well acquainted with the defendants, as the First National Bank of Plattsmouth, for which affiant had been the attorney; that about the time the mortgages given by defendants bear date, Mr. Waugh, an officer of the bank, came to affiant and informed him that defendants were in financial trouble; that by reason of the fire at Fairmont, they had been crippled financially; that they were in debt to the bank; and wished affiant to secure the claim, and to act promptly, which affiant proceeded to do; that affiant went to Mr. Nathan, the other partner, Solomon, being

away from home, sick. He hesitated, and refused to do anything unless he could treat all the creditors alike. Affiant urged the fact that the bank's relations were unlike that of other creditors, without the profits in other lines of business; that Mr. Nathan admitted this was true, but that he would rather prefer the persons who had worked for the firm for years, and in good faith had left their earnings in the business of the firm; that Mr. Nathan finally concluded to give, and did give, the mortgage to the bank, and at the same time made the other mortgages. Affiant then suggested to the officers of the bank to take charge of the stock and proceed to sell at once and save expenses, rent, and loss on goods by reason of the change in season, and after such consultation it was decided to have Mr. Finley, if he could be secured, take charge of the stock, invoice it, and place suitable help with him, among whom was P. P. Gass, and sell and apply the returns upon the notes. This was done, and as the goods were sold the money was credited. Affiant says he saw the notice sworn to by D. C. McEntee. It was at the cashier's desk, and affiant advised that it should be so done to invite purchasers, and the payment of cash for goods sold and purchased. Affiant says he was present when Mr. Waugh, the cashier, employed Mr. Finley and gave him the keys; that his salary was fixed at \$100 per month, and that he should have such help as he wished; that affiant advised the bank and Mr. Finley to sell as appears by the circular exhibited by the affidavit of C. W. Sherman. Affiant further stated that Mr. Nathan was present in the store to collect accounts due the firm, receive and answer mail, and to meet the traveling men for the houses from which they had been buying goods; that Nathan had been at their place of business a good deal since the mortgages were made, but that he paid but little attention to the sale of goods; that Finley was the man who did and directed all business in and about the store.

They also presented the affidavit of James Finley, who

testified that he had been in the employ of the firm of Solomon & Nathan, in Plattsmouth, about eleven years; that he is the party to whom the defendants executed a mortgage for wages due him, of \$500; that he was the confidential clerk of said firm; that at the time of making and delivery of the mortgage to him, the defendants were indebted to him in said sum for work and labor done and for wages earned before that time; that in giving the mortgage to him, there was no effort, desire, nor purpose, to delay or defraud any one; that he remembers the giving of the mortgage to the First National Bank of Plattsmouth. M. A. Hartigan was the bank's attorney who came with its claim and urged the payment of the bank, which had loaned the money, and in many ways, in years gone by, had assisted the defendants. Mr. Nathan said they would give up every dollar to save their name and credit. Mr. Waugh and Mr. Hartigan said they must realize on the stock as soon as possible, and requested affiant to take charge of the store and stock, and gave affiant one of the keys, the other being left with the bank until August 15, when the claim of the bank was satisfied and the mortgage discharged of record, the notes given up and the keys returned. During the time affiant held said stock, Mr. Nathan was about the store seeking to collect the outstanding claims due the firm, and gave affiant such advice as would best secure the interest of the bank mortgages first, and then that of affiant and the others. Affiant says there was no purpose to delay nor hinder any other creditor in giving said mortgages; that they were for *bona fide* debts, the main consideration being money advanced by the bank, and work and labor done and rendered by affiant and others. Affiant further stated that the position of P. P. Gass was only that of cashier put in the store at request of affiant, and that he had no other duty to perform than to take and keep an accurate account of the money from sales, and return the same to the bank, which he undertook to do.

At the time affiant took charge of the stock, Mr. Waugh agreed to pay him \$100 per month for his services during the time he acted for the bank; and affiant states, in conclusion, that there was a general understanding in Platts-mouth that he was selling under a mortgage, that this was an inducement to buy, and in many instances sales were effected thereby.

The affidavit of David McEntee states that he is an employé of the First National Bank of Platts-mouth; that on the next morning after the date of the mortgage by Solomon & Nathan to the said bank, he was placed in charge of the stock of goods by and for the bank, with James Finley, the former clerk of the firm; that affiant prepared a notice that "this store and stock is in the hands of mortgagees," and placed it where it could be seen by any one approaching the cashier's desk. The stock was in affiant's charge until Mr. Gass was placed in the store; the keys were given to affiant, who held them while in the store, and afterwards were in the bank until August 15.

On the other hand, the plaintiffs presented to said district judge, at said hearing, on their part, the affidavit of Eugene Montgomery Esq., of the law firm of Montgomery & Jeffrey, of Omaha, the resident attorneys of the plaintiffs, stating that on May 8, 1888, his firm received a dispatch from Moses & Newman, attorneys at law, of Chicago, the residence of the plaintiffs, instructing affiant's firm to go at once to Platts-mouth, to look after the plaintiffs' claim for goods and merchandise, sold to defendants, amounting to \$934.33. On May 9th, affiant went to Platts-mouth and sought out defendants at their place of business; saw the defendant Nathan, who, from all appearances, was in charge of the business, without any evidence or indication that defendants were not then in possession of said stock of goods and selling the same in their own interests, in the usual course of business, though affiant carefully noted the surroundings for the purpose of determining, without special

inquiry, as to who was in possession. After interviewing Mr. Nathan, and being satisfied that there were good grounds therefor, affiant at once prepared the necessary papers and commenced an action for the recovery of the amount for which defendants were indebted to the plaintiffs, and also for the suing out of a writ of attachment therein. He telegraphed to the plaintiffs' attorneys at Chicago for an attachment bond, but not being able to secure the same until the next day, May 10, did not commence the action until then; that late in the afternoon of the 9th of May affiant examined the records and files of the clerk of Cass county to see if defendants had conveyed, by mortgage or otherwise, to any one, their stock of goods and merchandise in Plattsmouth, but found no conveyance of any kind then on file; that on the next day, when this action was commenced, he again examined the clerk's records and files, and found filed therein late in the afternoon of May 9, 1888, three chattel mortgages by defendants upon said stock of goods and merchandise belonging to them, all of which mortgages were dated April 17, 1888, the first to the First National Bank of Plattsmouth, for \$5,000, the second to James Finley, for \$500, and the third to Fanny Nathan, Lee Sanders, and Simon Seelig, jointly, for \$5,500, to secure a note for \$2,500 in favor of Fanny Nathan, a note for \$2,000 in favor of Lee Sanders, and one for \$1,000 in favor of Simon Seelig; that the reason copies of said mortgages are not exhibited herewith is because they were released upon the records and taken from the clerk's office on the 10th day of August, 1888, and affiant is now unable to obtain copies thereof.

Affiant says that he remained in Plattsmouth throughout the day of May 10; that at frequent intervals he passed and repassed the store building wherein defendants had their stock of goods mortgaged as mentioned, and where they were doing business; that he frequently stopped at the door and carefully noted the condition of things therein

and thereabout; saw people going in and out; saw Mr. Nathan there, receiving customers as theretofore, and their wants attended to by the same clerks; but at no time saw any sign or indication that defendants had delivered up possession of said store and their stock of merchandise to the First National Bank of Plattsmouth, or to any other person, company, or corporation. Affiant, by careful observation, saw no notice in the window, nor anywhere, informing the public generally that defendants' possession of said store had ceased; but from all appearances, within and without, and by the signboards of defendants still hung up conspicuously, a careful observer could not but conclude that defendants' business was conducted by themselves as before the filing of the mortgages mentioned; and that said defendants were in open possession of said stock of goods and merchandise; that again, on May 18, 1888, affiant was at Plattsmouth throughout the day; that at frequent intervals on that day he passed and repassed the same store building where defendants had always conducted their business; that he frequently stopped at the entrance and noted every sign and indication within and without which would in any manner indicate who was in possession thereof, and who was conducting said business, and as before he noticed the said Mr. Nathan receiving customers and the old clerks attending to their wants, and as before no notices were posted up in the windows, nor in and about said store, to inform the general public that others instead of the said defendants were in possession and conducting the business, nor was there any evidence whatever that the First National Bank of Plattsmouth, or any other person except defendants, were in possession and selling the stock of goods and merchandise mortgaged as aforesaid.

Also the affidavit of William L. Brown, who states that he is an attorney at law, and has resided at Plattsmouth since November 1887; that he knows the storeroom where the defendants conducted their mercantile business in Platts-

mouth; that up to the commencement of this action he had never seen any sign nor indication in, about, nor around, said store evidencing in any way that the possession of the stock of goods therein was in any person, company, or corporation, other than the defendants; that since the commencement of this action he has taken particular pains to note the appearances in and about said store, for the purpose of discovering if there had been an actual change of possession of said store and its contents of merchandise; that he has never observed any signs, handbills, advertisements, or notices of any kind about said store or posted in the windows, informing the public that the defendants had delivered possession of the store and its contents to any one else, or hinting in any manner that any other person than the defendants were in possession; that soon after the commencement of this action he had conversations at different times with Mr. Nathan within defendant's store, and occasionally noticed one P. P. Gass in and about the store; that said Nathan told affiant that said Gass was there for the First National Bank of Plattsmouth, "to see how things were running," but that affiant would not have known why said Gass was around the store except for the information thus volunteered, or for what Gass himself might have told him; that Gass exercised no control in the conduct of the business, so far as affiant observed, but, on the contrary, that Nathan and his clerks attended to the selling of all goods, the same as though the bank was not represented.

Also the affidavit of P. P. Gass: That he is a resident of Plattsmouth; that on May 12, 1888, he was employed to represent the First National Bank as its agent in taking charge of the receipts of sales of the stock of goods and merchandise mortgaged by defendants; that in that capacity and for that purpose he attended the store daily where the stock was kept, except when the store was not kept open, until July 13, 1888, when his employment ended; that he did not have the keys to the store doors, but

the same remained in possession of defendants; that affiant gave no personal attention to nor did he direct the sales of merchandise, but the business was directed and ordered either by Mr. Nathan, of the defendant's firm, or by one of his principal clerks; that during affiant's employment as aforesaid, he was the only representative of said First National Bank in and about the store-room where the mercantile business of defendants was conducted.

Also the affidavit of Exa Bee Critchfield, the deputy clerk of Cass county, that the index of chattel mortgages in her office shows that on May 9, 1888, three chattel mortgages were filed, given by Solomon & Nathan on their stock of goods and merchandise in Plattsburgh; the first to the First National Bank of Plattsburgh for \$5,000, the second to James Finley, for \$500; and the third to Fanny Nathan, Lee Sanders, and Simon Seelig, jointly, for \$5,500, all of which were dated April 17, 1888; that the same were, on August 10, 1888, released upon the index of chattel mortgages, and the instruments themselves lifted.

Also the affidavit of C. W. Sherman, stating that he is one of the proprietors of the *Plattsburgh Journal*; that on July 26, 1888, at the request of Mr. Nathan, of the firm of Solomon & Nathan, there was printed the following advertisement: "Farewell. Great closing-out sale. On account of the death of Mr. Solomon, and the settlement of the estate being necessary, September 1, 1888, will terminate our business career of nineteen consecutive years in the city of Plattsburgh.

"We herewith extend to our many friends our sincere thanks for their generous patronage during these many years, and we now propose to give our *farewell bargain sale*.

"We accordingly offer our entire stock of dry goods, millinery, carpets, rugs, oil cloths, mats, crumb cloths, ladies', misses', and children's cloaks and winter wraps, plush garments, blankets, flannels, yarns, black and colored g. g.

silks, velvets, plushes, jewelry, trunks and valises, parasols, fans, corsets, laces, shawls, hosiery, staples, and countless articles usually contained in a first-class dry goods house, *at prices that will render the packing and shipment of any goods impossible. This sale is limited, commencing at once and ending August 31. The time is short; do not delay. All goods sold for cash only. All accounts due us must be settled by August 15, 1888. I. Nathan, surviving partner of the firm of Solomon & Nathan.*"

There were also before the district judge, as a part of the record in the case, the affidavits of Eugene Montgomery, made as one of the attorneys for the plaintiffs, in one of which he stated that he had "good reason to believe, and does believe, that the First National Bank of Plattsmouth, Nebraska, has property of the defendants in its possession, to wit: certain dry goods, notions, millinery stock, and other property to the affiant unknown;" and in the other of which it is also stated that he has "good reason to believe, and does believe, that James Finley, Fanny Nathan, Lee Sanders, and Simon Seelig, have property of the defendants in their possession, to wit, a stock of goods, the nature and extent of which are to the plaintiffs unknown."

Section 20 of the chapter above cited provides: "That the question of fraudulent intent arising in all cases under the provision of this chapter shall be deemed a question of fact and not of law." * * *

As we have seen, there were two questions before the district judge for his determination—one as to the immediate delivery and continued change of possession of the mortgaged property, and the other as to the good faith of the transaction—both of which are essentially questions of fact, and either one of which, if held to be in favor of defendants, is conclusive of the case.

The testimony of Montgomery as to the situation of the defendants' affairs at their store in Plattsmouth, at or about the time of issuing the order of attachment, constitutes the

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chief evidence tending to disprove the evidence on the part of defendants that the possession of the store and the goods had passed to the bank and was held by its officers and agents. The effect of this evidence must have been materially weakened, if not wholly destroyed, by his affidavits last above referred to, in which he seeks to charge the bank, as well as the other parties therein mentioned, with the possession on that day of this identical property. This could not well fail to convince the district judge that even this most important witness for the plaintiffs was not only in doubt as to who was in possession of the property, but really believed that the bank was in such possession.

I will not comment upon the above evidence further than to say that I think there is sufficient to uphold the district judge, and follow the rule so often laid down and maintained that the finding of questions of fact by a trial court or jury will not be reversed where the evidence is conflicting, unless clearly wrong or manifestly unjust.

The order of the district judge will be affirmed.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

NEIL R. BOLLONG, PLAINTIFF IN ERROR, V. SCHUYLER
NATIONAL BANK, DEFENDANT IN ERROR.

[FILED MARCH 20, 1889.]

National Banks: ACTION: USURY: DEFENSE: PLEADING: ESTOPPEL. Defendant in error, a national bank, brought separate suits against plaintiff upon two promissory notes. In each action plaintiff in error filed his answer, setting up as a defense that illegal interest had been contracted for and received by the bank, and asking that defendant have judgment only for the amount of money received less the usurious interest paid. Upon trials

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being had, the findings of the district court were in favor of plaintiff in error in each case, the credits being allowed and the costs taxed to the defendant in error, who was plaintiff therein. Subsequently plaintiff in error instituted this action for the recovery of twice the amount of the legal interest paid, as provided by section 5198 of the Revised Statutes of the United States. Defendant pleaded in bar the recovery of the usurious interests in the former suits, and upon trial the plea was sustained, and to the extent of the causes of action which had been adjudicated in the former suits, plaintiff's petition was dismissed. It was held, upon error to the supreme court, that the judgments of the district court in the former actions in favor of plaintiff in error, were not void, the facts presented by the answers being a subject-matter within its jurisdiction, and that the adjudications in favor of plaintiff in error in such actions were a bar to his recovery in this case; and second, that such adjudications being had in his favor, at his request, and upon his procurement, upon a subject-matter within the jurisdiction of the district court, he is now estopped to deny its validity.

ERROR to the district court for Colfax county. Tried below before MARSHALL, J.

J. A. Grimison, and *Phelps & Sabin*, for plaintiff in error, cited: *National Bank v. Garlinghouse*, 22 Ohio St. 492; *Davis v. Randall*, 115 Mass. 547; *Barnet v. National Bank*, 98 U.S. 555; *Stephen v. Monongahela National Bank*, 111 Id. 197; *Driesbach v. National Bank*, 104 Id. 52; *Bank v. Gruber*, 91 Pa. St. 377; *Windsor v. McVeigh*, 93 U. S. 274-284; *Freeman on Judgments*, p. 116-122, and cases cited; *Herman on Estoppel and Res Adjudicata*, p. 110; *Aspden v. Nixon*, 4 How. 467; *Houston v. Musgrove*, 35 Tex. 594; *Wanzer v. Howland*, 10 Wis. 8; *Damp v. Town of Dane*, 29 Wis. 420; *The State v. Richmond*, 6 Foster, (N. H.) 232, and cases cited; *Gilliland v. Adm'r of Selles*, 2 O. St. 227; *Withers v. Patterson*, 27 Texas, 494; *Filley v. Cody*, 4 Colo. 109.

E. T. Hodson, for defendant in error, cited: *Herman on Estoppel and Res Adjudicata*, p. 451; *Ela v. McConihe*,

35 N. H. 279; *Beam v. MacComber*, 35 Mich. 457; *Railway Co. v. McCarthy*, 96 U. S. 258; *Eustis v. Bolles et al.*, vol. VI New Eng. Rep., p. 82; Bigelow on Estoppel, p. 601; *Lounsbury v. Catron*, 8 Neb. 469; *Buchanan v. Dorsey*, 11 Id. 373; *Strong v. Irwin*, 12 Id. 446.

REESE, CH. J.

This action was instituted in the district court of Colfax county, for the recovery, under section 5198 of the Revised Statutes of the United States, of twice the amount of illegal interest alleged to have been paid defendant in error, it being organized as a national bank under and in pursuance of the laws of the United States.

The petition contained twelve counts or separate causes of action, each being based upon a payment of illegal interest alleged to have been made to the bank. The total amount for which judgment was demanded was \$707.10.

The answer of defendant contained, among other things, the allegation as to the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth, causes of action contained in the petition, that prior to the commencement of this action, defendant instituted two several actions against the plaintiff in the district court of Colfax county upon the notes which were the evidences of the indebtedness upon which the several payments of illegal interest were alleged to have been made, and that in said actions plaintiff presented as defenses the same facts which are set out in said counts of his petition in this case; and that upon issue being joined thereon, the district court, upon a hearing of the causes upon trial, found in his favor, and rendered judgment thereupon in accordance with said findings, and that the whole matter presented in the counts referred to in plaintiff's petition had been adjudicated in such actions.

A reply was filed by which all the allegations of the answer were denied.

A trial was had to the court, upon which it found in favor of the plaintiff upon the causes of action set out in the second and third counts, and rendered judgment against the bank for the sum of \$236. Plaintiff brings the cause into this court by proceedings in error, and assigns for error that the court erred in its finding against him on the fifth, sixth, seventh, eighth, tenth, eleventh, and twelfth, causes of action; that the findings and decision are not sustained by sufficient evidence, and are contrary to law.

It appears from the evidence introduced upon the trial that at a time prior to the commencement of this suit, the date of which is not given, the defendant instituted its action against plaintiff for the sum of \$2,000, alleged to be due upon a promissory note signed by plaintiff, dated May 24th, 1866, and due thirty days after date, and that plaintiff in his answer to the petition admitted the execution and delivery of the note, and alleged as a defense thereto, that on the 16th day of June, 1885, he borrowed from defendant the sum of \$2,000 for ninety days, and paid to it as interest thereon the sum of \$62, and that at divers other times, set out in the answer, the note was renewed and usurious interest paid, amounting in all to the sum of \$311.50 usurious interest collected by defendant.

The answer contained an admission that: "That there is due to the plaintiff upon said promissory note the sum of \$1,689.50, and no more." The prayer of the answer was that said sum of \$311.50 illegal interest paid might be deducted from the amount named in the note, and that the costs of the action be taxed to the plaintiff. Upon a trial in that case being had, judgment was rendered in favor of defendant, who was plaintiff in the action, for the sum of \$1,689.50, the amount confessed in the answer, and costs were taxed to it.

It further appears that another action had been instituted against plaintiff by defendant upon a note of \$1,200, in the same court, and that an answer was filed presenting at

length the defense of usury, admitting that there was due defendant the sum of \$994.80, and no more, and praying that the sum of \$149.40, the alleged usurious interest, be deducted from the original amount received. The result of the trial in that case was a judgment in favor of defendant for the sum of \$994.80, the amount confessed in the answer, and the taxation of the costs to it.

It clearly appears that the usury mentioned in the answers in the two cases referred to is the same as that which is alleged in plaintiff's petition in this case, and that in these actions the illegal interest received was applied as payment on the original indebtedness, under the provisions of the interest laws of this state.

The contention of plaintiff is that the judgments in the suits to the extent of allowing him credit for the illegal interest paid, were void, and are not a bar to this proceeding, notwithstanding they were rendered in his favor upon his answer in the nature of a cross-petition, and that he has received the benefit thereof.

The question has been ably presented by counsel on either side, both by oral arguments and briefs, and is to our mind not free from difficulty.

As it has been held by this court in *First National Bank v. Overman*, 22 Neb. 116, that state courts have jurisdiction to enforce the collection of the penalty prescribed by section 5198 of the Revised Statutes of the United States for taking illegal interest, it might be contended with quite a degree of reason that under the provisions of sections 100 and 101 of the Civil Code, the penalty given by the law of congress, where it arises out of the transaction which forms the basis of a plaintiff's suit, might be pleaded as a counter claim and allowed as such. And were this the correct view, it is clear that plaintiff could not recover in this case, for the reason that in the former suits he presented by his answer the same facts which are now set up in his petition, and that the district court, by his procurement, erred in not

giving the full relief prescribed by the law of congress ; and that the judgment would not for that reason be void. But it may be that in *Barnet v. Bank*, 98 U. S. 555, the supreme court of the United States have held otherwise, and that no proceeding could be maintained for the enforcement of the remedy given by section 5198 other than by a separate and independent action of debt. We think the case referred to scarcely reaches to that extent, as it does not clearly appear that the claim presented in that case for twice the amount of interest paid, was based upon the same transaction or contract set forth in the petition. As we deem it unnecessary to decide that question in this case, our decision will be based upon other and different grounds.

It may be conceded as contended by plaintiff, that the defense of usury under the interest laws of this state, cannot be pleaded in an action instituted by a national bank, as a legal defense, and that the state courts have no jurisdiction as against such banks to enforce the penalties prescribed by state law, and that the decisions of the district court in the former cases were erroneous, or even voidable; and yet we cannot see that plaintiff can again recover. In other words, that plaintiff having availed himself of a supposed remedy, and having received a judgment in his favor upon his answer and cross-petition without objection, and having accepted the result, is estopped from subsequently objecting to the authority of the court to render the judgment. The district court, by which the former judgments were rendered, was a court of general jurisdiction. While it may be true, as hereinbefore intimated, that by the rule in *Barnet v. Bank*, *supra*, it was error for such court to render judgment under the usury laws of this state, yet we are not aware of any rule which can be applied which would render the judgment absolutely void, no objection having been made at the time, and the case having been allowed to go to judgment. If it could be said that it was the duty of the district court to strike plaintiff's de-

fenses from his answer in these cases, and order them to be made the subject of separate and independent actions, yet its failure to do so could not render its judgments void as one without jurisdiction of the parties or of the subject-matter. The most that can be said is that it had not jurisdiction over the subject-matter in that form of action; but it did have jurisdiction in a proper proceeding. The procedure having been had without objection by either party, and at the instigation of plaintiff in this action, we think the judgment was not only not void, but that plaintiff would be estopped to question its validity to the extent of instituting another action for an additional recovery upon the same facts upon which his former recovery was had.

While the application of the principles here announced to cases exactly like the one at bar may not be frequent, yet we think they should be so applied. The legal propositions are elementary, and of the many cases cited by counsel for defendant, we need to refer but to Herman on Estoppel, and Res Judicata, section 51, *et seq.*, and cases there cited; *Edwards v. Stewart*, 15 Barb. 67; and *Blair v. Barlett*, 75 N. Y. 150.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

WILLIAM R. MURRAY, AND THE FIRST NATIONAL BANK OF PLATTSMOUTH, NEBRASKA, APPELLANTS,
v. WILLIAM B. PORTER, DEBORAH H. PORTER,
JANE R. PORTER, WILL H. PORTER, AND ALVA
A. PORTER, APPELLEES.

[FILED APRIL 4, 1889.]

1. **Real Estate Mortgage: INDEMNITY MORTGAGE TRANSFERRED: FORECLOSURE BY ASSIGNEE.** Plaintiff purchased of defendant certain real estate upon which a mortgage had previously been executed by defendant to a third party. To indemnify plaintiff against loss resulting from the foreclosure of said mortgage, and against damages resulting from the lien thereby created, defendant executed to plaintiff a mortgage on other real estate, which mortgage, as collateral security, plaintiff assigned to his co-plaintiff. The mortgage to the third party was foreclosed, the land purchased of defendant by plaintiff sold at judicial sale, the sale confirmed, and a deed executed to the purchaser. In an action by plaintiff to foreclose the indemnity mortgage, it was *held*, that said mortgage was assignable, and that the suit could be maintained thereon by the assignee.
2. ———: ———: **EVICTON.** In such case the condition of the indemnity mortgage being to save plaintiff harmless from all suits, decrees, judgments, orders of sale, executions, and all damages growing out of the breach of warranty, it was *held*, that an eviction from possession was not necessary, it having been shown that the title had been transferred to the purchaser under the foreclosure of the mortgage to indemnify against which the mortgage in this suit was given.

APPEAL from the district court of Cass county. Heard below before APPELGET J, sitting for CHAPMAN, J., and FIELD, J.

Covell & Polk, and *E. H. Wooley*, for appellants, cited: *Pillsbury v. Mitchell*, 5 Wis. 17; *Coleman v. Post*, 10 Mich. 422; *Ide v. Spencer*, 50 Vt. 293; *Rawle on Covenants of Title*, sec. 92; *Collier v. Gamble*, 10 Mo. 467; *Webb v.*

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Alexander, 7 Wend. 284; *Beddoe's Ex'r v. Wadsworth*, 21 Wend. 120; Jones on Mortgages, vol. I, sec. 802, and vol. II, sec. 1489.

M. A. Hartigan, for appellee, cited: Martindale on Conveyancing, sec. 471, and authorities cited; *Swan v. Yaple*, 35 Iowa, 248; *Ellison v. Daniels*, 11 N. H. 274; *Peters v. Jamestown Bridge Co.*, 5 Cal. 334; *Kuhns v. Bankes*, 15 Neb. 96, 97; *Hooker v. Eagle Bank*, 30 N. Y. 83; *Doremus v. Williams*, 4 Hun, 458; Abbot's Trial Evidence, p. 2; *McHugh v. Smiley*, 17 Neb. 620, 626, and cases cited; *Gregory v. Hartley*, 6 Id. 361; *Wilson v. Stillwell*, 9 Ohio St. 468; *Manahan v. Smith*, 19 Id. 384.

REESE, CH. J.

This action was instituted in the district court of Cass county, and was for the foreclosure of a mortgage on the northeast quarter of the southwest quarter, and the southeast quarter of the northwest quarter, of section twenty-six, town twelve, range thirteen east, in said county. The mortgage was in the usual form, conveying the real estate to William R. Murray, and contained among others the following provision:

"Provided always, and these presents are upon this express condition, that if the said Deborah H. Porter and William B. Porter, or if any person for them, or their heirs, executors, or administrators, shall save the said William R. Murray harmless in the premises following, that is to say: that whereas, Jane R. Porter has bargained and sold and conveyed to the said William R. Murray the following-described real estate, to wit: the northeast quarter ($\frac{1}{4}$) of the southeast quarter, ($\frac{1}{4}$) and the southeast quarter ($\frac{1}{4}$) of the northeast quarter, ($\frac{1}{4}$) of section twenty-seven, town twelve, range thirteen east, of the sixth P. M.; and there being a certain lien upon a portion of said land sold to William R. Murray by Jane R. Porter, to wit, a

trust deed or mortgage to secure the payment of \$1,900, and said mortgage deed or trust deed being now a valid and subsisting lien as aforesaid sold; now, if the said Deborah H. Porter and William B. Porter shall make good the covenants contained in the deed of Jane R. Porter to the said William R. Murray, and shall satisfy and discharge said lien as the same shall mature, and save the said William R. Murray harmless from all suits, decrees, judgments, orders of sale, executions, and all damages growing out of a breach of warranty, then the conditions of this indenture are fully complied with and of none effect; otherwise of full force and virtue in law."

It was alleged in the petition, that on the 20th day of March, 1880, the defendant, Jane R. Porter, sold and conveyed, by warranty deed of full covenant, to the plaintiff, William R. Murray, the land described in her deed, for the consideration of two thousand dollars; that Murray entered upon the land, and has since continued to occupy and improve it, and that it was worth, at the time of the commencement of the action, \$5,000; that prior to making of said deed to plaintiff Murray, defendant Jane R. Porter had made and delivered to one L. W. Tulleys, trustee, a mortgage on said land, with others, to secure a loan of money to defendant William B. Porter and Deborah H. Porter, which mortgage was in force and unliquidated at the time of the sale, and was a lien upon the land; that to induce said Murray to purchase the land, and make him secure against the mortgage referred to, defendants William B. Porter and Deborah H. Porter executed and delivered to him the mortgage upon which the suit is brought, for the sum of \$2,000, to indemnify him against loss or damage resulting from the mortgage to Tulleys upon the land purchased; that in the year 1886 plaintiff Murray had become indebted to plaintiff bank, and to secure the same had made a deed to the bank for the land described in the mortgage, with other lands, said deed being absolute in form, but in

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fact a mortgage, and had taken a bond to secure a reconveyance of the same upon condition that he should pay to the bank the money which he owed to it, and should also pay a prior mortgage executed to one C. H. Parmlee; that the defendants, Porters, did not pay the mortgage to Tulleys, but made default thereon, and that Tulleys by a proper proceeding in the United States circuit court for the district of Nebraska, had foreclosed the same and caused the land in section twenty-seven, originally sold to Murray, to be sold to satisfy the decree entered by said court; that the mortgage foreclosed was the one against which the mortgage in suit in this case was to serve as an indemnity; that by reason of the failure of the Porters to pay the indebtedness to Tulleys, and the subsequent foreclosure sale and conveyance of plaintiffs' land, the mortgage had become absolute, and was subject to a foreclosure, which was prayed.

Answers were filed to the petition, one being denominated the separate answer of Deborah H. Porter and William B. Porter; one the separate answer of Will H. Porter and Alva A. Porter, his wife; the other the separate answer of Jane R. Porter. On account of their great length, these answers will not be set out in this opinion; but their substance will be noticed in the discussion of the questions presented. The reply denied the affirmative allegations of the answers.

A trial was had to the district court, in which the court found that the land sold on March 20, 1880, by Jane R. Porter to plaintiff Murray, "exceeds in value the sum of \$3,137.10; that plaintiffs had been in actual possession and enjoyment thereof from that date to the time of the decree, and were still in such possession, and during said time had the rents and profits thereof, and which they were still enjoying; that Deborah H. Porter, the wife of William B. Porter, defendant, owned in her own name and right on said day, the land described in section twenty-six; and that on that day she with her husband executed a mortgage of

indemnity to Murray thereon, containing the proviso hereinbefore quoted; that on the 14th day of July, 1886, before the commencement of this action, Murray transferred all his interest in the mortgage to the plaintiff bank, and that having no interest in the subject-matter of the action, he was not a proper party plaintiff; that the amount of the mortgage, the payment of which the mortgage sought to be foreclosed in this suit was given to secure, was \$1,900, and was executed upon the lands described in the decree, among which was the land in section twenty-seven described therein; and that said mortgage had been foreclosed, the land sold, and the sale confirmed, the amount of the decree and fees being \$3,595.48, which was rendered on the 26th day of March, 1885; that on the 11th of February, 1886, Murray sold and conveyed to the bank the land sold to him by Jane R. Porter, which was before the land had been advertised for sale and sold under the foreclosure of the \$1,900 mortgage to Tulleys; that the sum secured by the mortgage sought to be foreclosed in this action, was the sum of \$2,000, which, together with the interest, amounted to \$3,137.10; that there was a default in the payment of the \$1,900 mortgage, by reason of which the conditions of the mortgage declared on in this case had become broken.

A decree was entered in favor of the bank, foreclosing plaintiff's mortgage, ordering the land to be sold for the purpose of paying the \$3,137.10 found due thereon, and "that the said William R. Murray be dismissed as one of the plaintiffs from this action."

From this decree defendants appeal.

Four questions are presented for decision, arising out of the allegations of the answers, which are:

First—The contention presented by the demurrer originally filed and by the answer, that the petition does not state a cause of action.

Second—That the mortgage sought to be foreclosed did not run to Murray nor his assigns, but to him only, and was

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not assignable; and that when the court found that he had parted with the land, and suffered no damage, the bill should have been dismissed.

Third—That neither Murray nor the bank have been evicted by paramount title, nor had either of them paid anything to remove the mortgage lien on the land in section twenty-seven, and, therefore, they were not entitled to a foreclosure of the mortgage declared on in the petition.

Fourth—That the mortgage described in the petition is in the nature of a bond for the specific sum of \$2,000, and that the liability of Deborah H. and William B. Porter thereunder cannot be enlarged by the addition of interest; that by the terms of the mortgage they promised to indemnify Murray to the extent of \$2,000 and no more.

As the questions presented by the first and third assignments are substantially the same, the first will not be here noticed.

As we have seen, it was found by the district court that the mortgage executed to Murray had been duly assigned to the bank. We cannot quite agree with the conclusion of the district court, that by the assignment Murray had divested himself of all interest in it, it being clearly shown that the assignment was only intended as a security. But this is not, perhaps, material; at least nothing is claimed upon that ground by appellants. It would, no doubt, have been competent for the bank alone to institute and maintain the action under the provisions of section thirty of the Civil Code; but the proceeds of the suit, although inuring to the bank, would be to the credit of Murray, upon his indebtedness to it. In the absence of other conditions, we entertain no doubt but that the mortgage was assignable, and that the bank, either with or without associating itself with Murray as plaintiff, could maintain an action upon it.

Upon the contention that there had been no eviction of Murray, nor the bank, and that, therefore, the action could not be maintained, it is the opinion of a majority of the

court that for the purpose of the foreclosure of the mortgage no eviction was necessary, the condition of the mortgage being to save Murray harmless from suits, decrees, judgments, orders of sale, executions, and all damages growing out of a breach of the warranty in the deed, there having been sufficient proof that the mortgage had been enforced against the land purchased by Murray and a sale made by which the title passed to the purchaser, and thereby the condition of the mortgage broken. (*Gregory v. Hartley*, 6 Neb. 356; *Stout v. Folger*, 34 Iowa, 74; *Lathrop v. Atwood*, 21 Conn. 117; *In re Negus*, 7 Wend. 499; *Thomas v. Allen*, 1 Hill, 145; *Churchill v. Hunt*, 3 Denio, 321; *Wilson v. Stihwell*, 9 O. St. 467.)

To this the writer does not fully agree. The proof and findings of the court show that plaintiffs have not been disturbed in their possession, and it is further shown by the evidence that the right to the possession is in dispute between Murray and the purchaser at the foreclosure sale. If defendants sustain plaintiff's possession, or by any other means prevent the disturbance thereof under his purchase, which might be done, and thus avoid an eviction, we can see no equitable ground for a recovery in this case.

While there is no direct proof of a conveyance by the commissioner to the purchaser at the foreclosure sale in the United States circuit court, yet there is, perhaps, sufficient in the record to justify the district court in finding that such deed had been issued, the proof being made by the introduction of an answer of defendants in another suit, in which Murray and the bank was plaintiff, and A. B. Smith, Henry W. Yates, James R., William B., and Jane R. Porter, were defendants. In that answer an admission was made of the execution of the deed, and as it is not contended in this court that there was no proof of its execution, we will treat the fact as conceded.

The last contention of the appellants is that the mortgage is in the nature of a bond for the specific sum of

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\$2,000, and that the liability of Deborah H. and William B. Porter thereunder cannot be enlarged by the addition of interest. In other words that these parties bound themselves and their land to the extent of \$2,000, and no more, to indemnify Murray.

Upon this branch of the case, also, a majority of the court agree with the district court and affirm its decision, the conclusion being that according to the rule stated in the cases above cited, the mortgage having been executed as a security for the purchase price of the real estate bought of defendants by Murray, and the title having failed, plaintiffs were entitled to a return of the purchase price, with legal interest. (*Long's Adm'r v. Long*, 16 N. J. Eq. 59, and cases cited; *Goldhawk v. Duane*, 2 Wash. C. C. 323; *Ives v. Bank*, 12 Howard, 159; *Wallace v. Wilder*, 13 Fed. R. 716; *The "Wanata,"* 5 Otto, 617; *U. S. v. Arnold*, 1 Gall. C. C. 348.)

It follows that the decree of the district court must be affirmed, which is done.

DECREE AFFIRMED.

THE other Judges concur.

WHITFIELD SANFORD, PLAINTIFF IN ERROR, v. S. H.
SORNBORGER, DEFENDANT IN ERROR.

[FILED APRIL 4, 1889.]

1. **Contracts: DURESS.** It is those contracts only which are made under fear of unlawful imprisonment, and not those made under fear of imprisonment which would be legally justifiable, that can be avoided for duress.
2. **Embezzlement: CHATTEL MORTGAGE: RATIFICATION.** A party being charged with embezzlement, executed a chattel mortgage to secure the debt, and retained possession of the mort-

26	295
34	498
26	295
41	829
26	295
54	646

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gaged property for about a year and a half, when he delivered the possession thereof to the mortgagee. In an action of replevin thereafter brought by the mortgagor to regain possession of the property, *held*, on the facts proved, that he had ratified the mortgage.

3. **Contracts.** Duress which will avoid a contract is either by unlawful restraint or imprisonment; or, if lawful, it must be accompanied by circumstances of unnecessary pain, privation, or danger, or when the arrest, though made under legal authority, is for an unlawful purpose.
4. **Evidence.** Where papers or letters which are pertinent to the issue are offered in evidence on the trial of a case, they should be admitted. The court will not take notice how they were obtained, nor will it form a collateral issue to determine that question.

ERROR to the district court for Saunders county. Tried below before MARSHALL, J.

J. R. & H. Gilkeson, for plaintiff in error, cited: *Heaps v. Dunham et al.*, 95 Ill. 583; *Taylor v. Cottrell et al.*, 16 Id. 93; *Schommer v. Farwell et al.*, 56 Id. 544; *Mays v. Cincinnati*, 1 Ohio St. 278; *Seeds v. Simpson & Knox*, 16 Id. 328; *Mundy v. Whittemore*, 15 Neb. 651.

S. H. Sornborger, and *G. W. Simpson*, for defendant in error, cited: *Hatter v. Greenlee*, 26 Am. Dec. 374; Bishop on Contracts, Ed. 1887, sec. 715; *Baker v. Morton*, 12 Wall. (U. S.) 150, 159; *Taylor v. Jaques*, 106 Mass. 298; *Hullhorst v. Scharner*, 15 Neb. 57; *Eadie v. Slimmon*, 26 N. Y. 9; *Tapley v. Tapley*, 10 Minn. 360; *Robinson v. Gould*, 11 Cush. (Mass.) 55; *Foss v. Hildreth*, 10 Allen, (Mass.) 80; Wharton's Evidence, sec. 482, 2d Ed., and cases there cited.

MAXWELL, J.

This is an action of replevin brought by the defendant in error against the plaintiff in error, to recover the possession of certain law books and book cases. On the trial

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of the cause the jury returned a verdict in favor of the defendant in error, and a motion for a new trial having been overruled, judgment was entered on the verdict. The plaintiff in error claims an interest in the property in question by reason of a chattel mortgage executed thereon on the 24th day of May, 1883, and duly filed in the county clerk's office of Saunders county. The principal defense of the defendant in error is that the mortgage was executed under duress, and is therefore void. The plaintiff in error contends that the proof fails to show duress. At the time this transaction took place, the defendant in error was a son-in-law of the plaintiff in error, who then resided in Illinois, and the defendant in error had been loaning money for him for several years. The direct examination of the defendant in error is as follows:

Q. Do you remember about the time Mr. Sanford removed to Saunders county, Mr. Sornborger?

A. Yes, sir.

Q. You may state to the jury when it was.

A. It was in the fall of 1882, I believe—early in the winter.

Q. You may state what business transactions you had with him, soon after that, if any.

A. Mr. Sanford and his son made their business headquarters at my office in the winter of 1883; that is, early in the winter or along in the spring of 1883. I don't remember the time. I think it was in the spring, along perhaps in April or May, we had a settlement of our affairs.

Q. Well, what did you arrive at in that settlement? What difference did you find between you?

A. I can't recollect the amount, but it occurs to me that it was in the neighborhood of \$6,000.

Q. In whose favor was that?

A. In favor of Mr. Sanford.

Q. Well, what was done in reference to that settlement, if anything?

A. At that time I had certain real estate, or had previously had certain real estate in this county, which I had sold; I had bought it as a matter of speculation and resold it, and among other things I tendered him, offered him the securities that I had in that, and I had retained titles, and conveyed the land to Mr. Sanford as far as that went. In addition to that, myself and brother had been doing horse business, and I had the furnishing of the most of the money in my name. I had considerable paper of that class, and quite an amount, amounting in all—aggregating—\$6,000, in fact more than that; and I gave all the paper I had, I guess, in the world, pretty near. Then I gave him all the paper I had, or at least all I had in hand, including that I have described, and out of the paper he was to choose that that he wanted; that is, he desired to take the best, and he took it, and selected the desired amount out, and as I supposed, that was to end the difference.

Q. What followed then subsequent to that?

A. Prior to that time, some time in 1881, he loaned me the special or peculiar loan upon which he had no written evidence, unless it was my letters—an arrangement by which if I could make any deals on my own account in the way of purchasing personal notes or securities of that kind, I might draw on him for the money necessary until he told me to stop; I believe that was the arrangement, and I had agreed that that paper should, I think, stand as his security; that is, that he—I don't think as stated by Mr. Gilkeson in the opening that it was agreed that the paper should be taken in his name; at least I never took any in his name in that deal. The amount of money that I got of him for that purpose amounted to somewhere between \$3,500 and \$4,000; I was to pay him ten per cent, and if I could make any money over and above that, why I did it, and sometimes got discount and discounted paper; and it was understood that that should stand for his security in the matter; that is, such paper and security as I

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might buy —. Now I will go on. That was in 1881, I should judge; perhaps it was in the latter part of 1880. It was somewhere in the fall of 1880, or in the winter or spring of 1881. — I find no data by which I can refresh my memory on the subject. It was after I returned from Denver, and that is all I can tell, and that was in 1880. It had run two or three years, and of course I had collected and reinvested and disposed of much of the paper. Much of it was ninety-day paper, and some of it a year; and none of it I bought, or took, or had to deal with, was more than a year; and of course I would collect and reinvest, and owed him the principal sum on that account of \$3,500 or \$4,000—somewhere between. While we were having our settlement we had some reference to that, and he demanded very unexpectedly of me where those securities were. He had been in Wahoo some four or five months; it had been sometime previous to that, the arrangement had been made. I told him some of it got in my business—horse business—got invested that way. In talking about the matter, either at the first time—I think perhaps it was a subsequent time, but before any talk of securing the mortgage in question was made—he told me in connection with this, he had been reliably informed that he could hold me for embezzlement; that he had taken counsel of Mr. Reese; that my disposition of that paper was embezzlement. When we had reached an agreement as to the amount of money that was due, Mr. Sanford had, as I stated before, taken what notes I had, what I had in the safe, and had taken them out to make inquiry and choose from them; he came back with them in the office one day, and he then said to me—he searched out what he would like to take and let me have the rest—and now, he says, here is this, and I want some security on it, or how do you propose to secure it? and I told him that I thought it was well enough secured; that it was such as I had; he had the best; he had his choice; and he said then that he

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wanted them guaranteed, and the guaranty secured on the library, by a mortgage on the library. I told him that I could not do that; that the library and few notes I had was about all I had left, and I did not want to part with it at all, and objected emphatically. Well, he says, you know that you have been guilty of embezzling this other paper, and you have not got it here, and you know I have been advised that I can successfully prosecute it, and I propose to do it, if you don't settle this matter up in my way, or words to that effect.

Q. What further conversation did you have at that time about it, if any?

A. Well, I was scared about the matter, nervous; did not want to be prosecuted.

Q. What did you tell him then?

A. Well, I told him that I would take it and consider the matter; that I did not know whether—did not believe that he had a case; did not know, but would let him know later. We had considerable talk about it and he went out.

Q. Was there anything said in that conversation in reference to your business there, or the effect of a prosecution of that kind by either party?

A. No, sir; I think before that time he had made a remark in the first talk that he should regret very much to make me any trouble, or injure my business, and I had concluded from that that he was not going to make any disturbance about the question one way or the other.

Q. Now did you, before the execution of the mortgage, have any conversation with him in reference to the security?

A. Yes, sir.

Q. When was that?

A. That was the day before the execution of this mortgage.

Q. When was that with reference to this conversation you have just related?

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A. It was a day or two days afterwards—shortly afterwards. He had come back into the office for the purpose of ascertaining what I was going to do. He had taken his notes with him, those he had selected, and I took the rest.

Q. Was there any one present in the office at this conversation which you have detailed?

A. My brother was there.

Q. He came back the next day, or the next day but one, again, in pursuance of your agreement?

A. Yes, sir; he came back the next day, or the next day but one—I don't remember; it was the day before the final execution of this mortgage.

Q. Well, what occurred then?

A. He came into the office and wanted to know what I had made up my mind to do, and I said, Mr. Sanford, I cannot execute a mortgage on my library; and he at once says, Then I propose to prosecute you as far as I can; I propose to have this settled my way, and I can't take anything else.

Q. Well what further was said at that time?

A. He said, Then I propose to prosecute you at once. My brother was in there then; he had gone out, though, in the meantime, when this conversation had taken place, and we sat and talked, and after that, after he had gone, he told me again that he did not want to make me any trouble; that he regretted to do it; that he knew it would be injurious to my business, and he did not want to do that; but that he proposed to have this matter secured right now; that I had been guilty of certain irregularities with which he charged me, and guilty of this embezzlement, and he finally got my consent that I would execute this mortgage. The mortgage was not then filled out. He went away from the office with the agreement that the next morning we should fix it up and make this mortgage.

Q. What was the agreement about making it, preparing it, doing the clerical work?

A. The question arose then about describing the library,

and he wanted the books—names of them—taken down in detail; he said he would prepare a mortgage and I would take down the list of books, and the mortgage would refer to the list, and that had to be done before it could be executed. That night I prepared in my own handwriting a list of the books, and the next morning, in pursuance of that agreement, we went into the Saunders County National Bank and I executed this mortgage, and gave it to him.

Q. Do you know whether or not Judge M. B. Reese was prosecuting attorney in this district at that time?

A. I suppose that is not the best testimony; I know he had been; I don't know that he was then, Mr. Simpson; anyway; I can't tell as to that anyway.

Q. Was you alarmed at those threats of Mr. Sanford? You may state what effect those threats had upon you, if any, in reference to the execution of this mortgage.

A. Well, I was scared; I had been all the way through, from the time he first—I had been very much excited about the matter from the beginning of his first threat, because I knew that a prosecution, whether it was well or ill founded, would be my practical ruin in this place, especially by him under the circumstances.

Q. You may state what effect it had upon the execution of this mortgage?

A. That threat was the father of that mortgage; if it had not been for the threat, there would not have been any mortgage.

The defendant in error in his cross-examination evades a direct answer to a number of questions asked, particularly in regard to certain notes, amounting to from \$2,000 to \$2,500, which notes, it is claimed, belong to the plaintiff in error, but which the defendant in error had delivered to the First National Bank at Fremont to secure a loan to himself. In July, 1881, the defendant in error wrote to the plaintiff in error in regard to proposed loans, as follows: "During the spring and summer I have been

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buying from time to time small notes variously secured, until I have now about \$700 of such bills receivable; but have now more opportunities to buy than money to buy with. I get them at ten per cent, due generally in ninety days to one year, and I am led by the opportunity to make you a proposal by which, if you choose to accept, we can both get some money, *i. e.*: I will assign to you all I now have and all I hereafter buy, if you will advance the money necessary, money for future investments; I to pay you ten per cent for all so used; a separate account of such funds to be kept, and all the money to be paid on notes now held or hereafter bought, to be credited on that account, *i. e.*, to be placed to your credit, and none of that money to be used or credited to me until final settlement." In reliance upon the statements made in the letter, the funds in question seem to have been furnished. There is also a letter dated September 1, 1881, containing a statement showing the investment of the funds of the plaintiff in error to the amount of more than \$3,000. On his cross-examination the defendant in error testified that at the time the plaintiff in error sought to take the property in controversy under the mortgage, he did not say to him that he could have it. He testifies in answer to questions:

Q. Was you not very badly scared at that time?

A. The statute of limitations had run against anything he could possibly do.

Q. For a criminal prosecution?

A. Yes, sir; I knew he would not be fool enough to commence an action when he knew the statute had run against anything he had.

Q. You felt satisfied that you could not go to the penitentiary?

A. You bet I did, then; and I wasn't quite sure of it before.

George I. Wright, an attorney of Wahoo, testifies that on or about the 30th day of June, 1883, and soon after the

execution of the mortgage in question, he had a conversation with the defendant in error at Wahoo as follows: "It was about noon one day when there had been a trial going on, I think upstairs here, but it may possibly have been in county court, and I saw Mr. Sornborger in the hall of the court house, down stairs, meet Mr. Sanford, and they shook hands and spoke to each other, and immediately afterward I spoke to Mr. Sornborger and asked him in substance how it came that the old gentleman would shake hands with him; and he said that the old gentleman and he always got along all right, and that there never would have been any trouble between them had it not been for Charlie."

This testimony is not denied. There is also a letter in the record, written by the defendant in error to his wife on the very day on which the mortgage in question was written, in which he says: "To father and mother I am under lasting obligations for kindness shown by them even in what was to them trying emergencies." This letter was objected to as "incompetent, immaterial, and irrelevant, shows on its face to be a communication to the wife of the plaintiff in this case, and is privileged." The letter was thereupon excluded, to which exception was taken. This is not an action between husband and wife, and the rule is well settled that where papers or letters are offered in evidence which are pertinent to the issue, they should be admitted, and the court will not form a collateral issue to determine whether or not they were lawfully obtained. (*Geiger v. State*, 6 Neb. 545; *Legatt v. Tollervey*, 14 East, 302, 306; *Commonwealth v. Dana*, 2 Metc. [Mass.] 337.)

The person referred to as "father" in the above quotation from the letter, was the plaintiff in error.

On the 11th day of November, 1885, the plaintiff in error sought to take possession of the property in question for the purpose of foreclosing his mortgage. The testimony tends to show that the defendant in error stated that he was ready to give up possession of the property, and that an

Sanford v. Sornborger.

arrangement was entered into between the parties whereby the property was to remain in the office of the defendant in error, but the possession to be in the plaintiff in error. This arrangement continued until about the time the sale was to take place, when the defendant in error instituted an action of replevin. The plaintiff in error denies that he made any threats against the defendant in error, but testifies that he stated that the acts of which he complained constituted embezzlement. The testimony clearly shows that there is a full consideration for the mortgage in question. Does the proof show that it was obtained by duress? We think not. Taking the testimony of the defendant in error and giving it its full force and effect, it fails to show duress. No case has been cited holding that such acts constituted duress, and after a pretty thorough examination of the cases, we have been unable to find any such decision.

In *Hullhorst v. Scharner*, 15 Neb. 57, where there was no consideration for the note and mortgage, and the testimony showed that it was obtained by means of threats to send the maker thereof to the penitentiary for an alleged, "indecorous, indecent, and injurious, examination of the daughter" of the mortgagee while treating her for a female difficulty, it was held that there was no consideration for the note and mortgage, and that it was obtained by threats of unlawful imprisonment and degradation. That case, however, seems to have no application to that under consideration.

In *Mundy v. Whittemore*, 15 Neb. 647, where a husband was charged with embezzlement and his wife gave a mortgage upon her separate property to secure the debt, it was held that the proof failed to show that the instrument was executed under duress.

The fact that a party is indebted to another and liable to a criminal prosecution, will not defeat the validity of an instrument given to secure such debt, unless it has been obtained by violence and undue means. It is those contracts

only which are made under fear of unlawful imprisonment, and not those made under fear of imprisonment which would be legally justifiable, that can be avoided for duress. (*Eddy v. Herrin*, 17 Me. 338; *Wilcox v. Howland*, 23 Pick. 167; *Waller v. Cralle*, 8 B. Mon. [Ky.] 11; *Alexander v. Pierce*, 10 N. H. 494; *Lester v. Union Man. Co.*, 1 Hun, [N. Y.,] 288; *Plant v. Gunn*, 2 Woods, [C. C.,] 372; *Landa v. Obert*, 45 Tex. 539; 6 Wait's Actions and Defenses, ch. 19; *Compton v. Bunker Hill Bank*, 96 Ill. 301; *Neally v. Greenough*, 5 Foster, [N. H.,] 325; *Alexander v. Pierce*, 10 N. H. 494; *Eddy v. Herrin*, 17 Me. 337; *Davis v. Luster*, 64 Mo. 43; *Knapp v. Hyde*, 60 Barb. [N. Y.] 80; 6 Am. & Eng. Encyc. of Law, 69.)

If this were not so, duress would be a complete defense to every recognizance given by a party to prevent his imprisonment. He could, with truth, say that he was compelled to execute it to avoid imprisonment. Such a plea, however, would be unavailing as a defense, although the instrument had been executed by the party as a matter of necessity in order that he might enjoy his liberty. So in the case at bar: the proof tends to show that the defendant in error had used notes in his business which belonged to the plaintiff in error, and to secure the amount due, he executed the mortgage in question. It was a lawful debt, and, so far as appears, was lawfully secured.

In *Neally v. Greenough*, *supra*, it is said: "A legal and proper arrest, upon the demand in question not designed to effect any other purpose than the obtaining of bail in the action, and unaccompanied with any severity or other impropriety of manner, is never to be deemed a duress. (2 Inst. 481; 2 Bac. Abr. 402; 1 Black. Com. 136; Shep. Touch. 61; *Richardson v. Duncan*, 3 N. H. 508.)"

In *Landa v. Obert*, 45 Texas, 547, the law is clearly and accurately stated, as follows: "Duress which avoids a contract, is either by unlawful restraint or imprisonment; or, if lawful, it must be accompanied by circumstances of

unnecessary pain, privation, or danger; or, when the arrest, though made under legal authority, is for an unlawful purpose, (*Phelp v. Zuschlag*, 34 Texas, 380,) or from threats calculated to excite fear of some grievous injury to one's person or property. * * * Viewing the evidence relied upon to prove duress in the most favorable light possible for appellee, it can amount to no more than threats of a criminal prosecution for embezzlement, and of a civil action for the money which appellant claimed had been wrongfully and fraudulently withheld from him by the appellee."

The case of *Keckley v. Union Bank*, 79 Va. 459, in some of its features resembled that under consideration, but the acts complained of were held not to constitute duress.

In *Colglazier v. Salem*, 61 Ind. 445, the action was brought to recover back money paid to the defendant for license to sell intoxicating liquors, which the plaintiff alleged he had paid to the defendant "by reason of threats and menaces to prosecute him under said ordinances and in fear of arrest, fine, and imprisonment." The court held that no recovery could be had.

In *Bodine v. Morgan*, 37 N. J. Eq. 426, a father and son while in the plaintiff's employment appropriated to their own use certain store orders and goods. Upon the discovery of the appropriation, the father executed a mortgage upon his lands to secure the payment of the amount so abstracted. He continued in the employment of the plaintiff at intervals for nearly five years, and made no objection to the validity of the mortgage until after an action had been instituted to foreclose it. It was held that the plea of duress was not sustained.

Admitting all that is claimed by the defendant in error, the threatened arrest was to be for a lawful purpose. The alleged threats were not to be made with unnecessary pain, privation, or danger, nor such as to excite fear of grievous injury to his person or property, and were evidently not

intended for an unlawful purpose. The proof therefore fails to establish the defense.

The uncontradicted testimony shows that a year and a half after the execution of the mortgage in question, the defendant in error delivered the possession of the property in controversy to the plaintiff in error, and thereby ratified the mortgage.

It is unnecessary to review the instructions. As the testimony fails to make a case of duress, the jury could not under the evidence find that fact to exist. The court therefore should have set the verdict aside. The rule is that where there is testimony tending to prove the existence of certain facts, it must be submitted to the jury. Where, however, the testimony fails to establish the existence of such facts, the jury cannot go beyond the testimony and infer their existence. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

COBB, J., concurred.

REESE, CH. J., did not sit.

26	308
53	754

26	308
60	490
60	629

WM. WINSLOW, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

[FILED APRIL 10, 1889.]

1. **Burglary.** In an indictment for burglary, it is necessary that the name of the owner of the building broken into should be given, and for this purpose the person in the visible occupancy and control of the premises, at the time of the burglary, may be set out as the owner, whether he be the owner of the title or a tenant.
2. ———. In such case it is also necessary that the indictment contain an averment that the breaking was with intent to steal property within the building.

ERROR to the district court for Johnson county. Tried below before BROADY, J.

Daniel F. Osgood, for plaintiff in error, cited: Vol. 1 Wharton Criminal Law, sec. 816; Bishop on Criminal Procedure, 139; Maxwell's Criminal Procedure, 105; *State v. Williams*, 41 Texas, 98; *State v. Maxwell*, 42 Iowa, 208.

William Leese, Attorney General, for defendant in error, cited: Maxwell's Criminal Procedure, p. 105; *Hall v. State*, 48 Wis. 688; *State v. Mann*, 25 O. S. 668; 2 Bishop Criminal Procedure, sec. 698; *Sallie v. State*, 39 Ala. 691; Maxwell's Criminal Procedure, p. 376, note; *People v. Lewis*, 64 Cal. 401; 1 Wharton Criminal Law, sec. 813, 820.

REESE, CH. J.

Plaintiff in error was convicted of the crime of burglary.

He brings the cause into this court for review, by proceedings in error.

His principal objection is to the indictment which was returned by the grand jury, the charging part of which is that he "did on the fifth day of February, in the year of our Lord one thousand eight hundred and eighty-seven, in the county of Johnson and state of Nebraska aforesaid, then and there feloniously and burglariously, in the night season, willfully, maliciously, and forcibly, break and enter into a store house occupied by one Robert M. Frost, in the city of Tecumseh, with the intent to steal property of value of said Robert M. Frost, contrary to the form of the statute," etc.

It is contended: 1st, that the indictment contained no averment as to the ownership of the building broken into; 2d, that there was no description of the offense intended to be committed; and 3d, "That the property which it was

averred plaintiff intended to steal, was not alleged to have been in the building referred to at the time of the alleged breaking.

Section forty-eight of the Criminal Code provides that: "If any person shall, in the night season, willfully, maliciously, and forcibly, break and enter into any dwelling house, kitchen, smoke house, shop, office, store house, mill, pottery, factory, water craft, school house, church or meeting house, barn or stable, warehouse, malt house, still house, railroad car factory, station house, or railroad car, with intent to kill, rob, commit a rape, or with intent to steal property of any value, or commit any felony; every person so offending shall be deemed guilty of burglary, and shall be imprisoned in the penitentiary not more than ten nor less than one year."

It is conceded by the deputy attorney general that in an indictment or information for burglary, the name of the owner of the building must be stated with reasonable certainty. And such is the law of the case; but many of the distinctions of the common law as to the ownership of property with reference to which burglary may be committed, have been dispensed with, and it is not necessary to allege the title or character of ownership. The actual occupant lawfully in possession of the building and having the exclusive use and control of the premises, is the proper party in whom to allege ownership. Ownership as against the burglar means any possession which is rightful. (See Maxwell's Criminal Procedure, 104 and 105, and cases cited in note.)

It will be observed that the indictment in this case charges that the store house was occupied by one Robert M. Frost; but there is no allegation of his ownership. It was perhaps a matter of doubt in the mind of the pleader as to whether the occupancy of Frost was sufficient to justify the allegation of ownership, and therefore he preferred to state the facts as they existed. This, however, does not

meet the requirements of the settled rule of criminal pleading. In cases of this kind there must be an allegation of ownership. (Wilson's Ohio Criminal Law, 54, sub-title, Ownership; 2 Bishop's Criminal Procedure, section 137; 2 Archibald on Criminal Procedure, etc., 1093.) And as we have seen, the lawful occupancy of the property by one in possession is sufficient to justify an allegation that he was the owner. If Frost's occupancy was lawful, and one by which he was entitled to the possession, use, and enjoyment of the property, ownership should have been alleged in him.

As to the second objection to the indictment, it must be sufficient to say that neither by the motion for a new trial nor by the brief of plaintiff in error, is it shown just what criticism is intended to be made. It will not, therefore, be examined.

The third objection to the indictment is that it is nowhere alleged that the breaking was with intent to steal property within the building broken into, the language of the indictment being, "with intent to steal property of value of the said Robert M. Frost." In 2 Archibald on Criminal Procedure, 1076, in discussing the question of the allegation of intent, the author says: "But if the intent alleged be to commit a larceny, it is not necessary to show whose goods they were; it is sufficient to state them to be 'the goods and chattels in said dwelling house then being.'" But in pleading the larceny actually committed, the ownership must be stated as in an indictment for larceny.

In 2 Bishop on Criminal Procedure, sec. 145, it is said: "The common form of charging the intent is to say, for example, 'with intent the goods and chattels of one (or the said) B. in the said dwelling house then and there being, (then and there,) feloniously and burglariously to steal, take, and carry away.'" The words then and there, in parenthesis, are referred to in the foot-note as being unnecessary.

We think it cannot be doubted but that in an indict-

ment of the kind before us it should be alleged that the breaking was committed with intent to steal property in the building broken into, the usual form being "with intent to steal the goods of, (the name of the owner,) in said (building) then and there being." (See 2 East's Pleas of the Crown, 516; 1 Wharton's Precedents of Indictments and Pleas, 351; Maxwell's Crim. Proc. 101.)

We have been unable to find any precedent where the words referred to or their import are omitted, and we think upon principle they should not be.

Clearly under the statute the intent must give quality to the breaking, although the breaking is the offense. If a person should break into a building in which no property subject to larceny existed, and which fact was known to him, he would not be guilty of breaking with intent to steal property under the provisions of the section of the criminal code above quoted, even though he might intend at some other time and place to steal the property of the owner of the building. The entry must have been with intent to steal property by means of the entry. The intention must prompt the act, and in order to do so, the intention must be to steal property in the building. We think the indictment in this particular is defective, and that a new trial must be had.

While the question is not presented, we trust we may be pardoned for calling the attention of the pleader to what is supposed by some writers to be a necessary allegation in an indictment for burglary — and this is an allegation of the particular hour at which the breaking occurred. Not that it is necessary that such particular hour be proved, but for the purpose of showing upon the face of the indictment that it was "in the night season." (See 1 Wharton's Prec. of Ind. & Pleas. 349, note B; Maxwell's Criminal Procedure, chap. 13, and precedents for the crime of breaking and entering buildings; 2 Bishop on Criminal Procedure, sec. 131; Wilson's Ohio Criminal Law, 53.)

Mulloy v. Kyle.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other Judges concur.

26	313
56	455

JAMES MULLOY, JOHN MULLOY, AND PATRICK MULLOY,
APPELLANTS, v. FRANK KYLE, ROBERT B. GRAHAM,
J. W. BOGGS, JOHN M. THAYER, GILBERT L. LAWS,
CHARLES H. WILLARD, WILLIAM LEESE,
AND JOSEPH SCOTT, APPELLEES.

[FILED APRIL 10, 1889.]

1. **Administration of Estates.** An administrator may sell a lease, of real estate for a term of twenty-five years, held by his intestate, as personal property, under a proper order from the county court, without obtaining a license therefor from the district court, as in case of the sale of real estate for the payment of debts.
2. **School Land Leases.** A lease of school land executed by the proper state officer containing no provision for the purchase of the land by the lessee, is not rendered a contract for the purchase of land, under section 94 of chapter 23 of the Compiled Statutes, by reason of the provisions of section 15 of chapter 80, entitled School Lands and Funds, which gives the lessee of school land the first right to purchase the leased premises at their appraised value.

APPEAL from the district court of Lancaster county.
Heard below before FIELD, J.

Lamb, Ricketts & Wilson, for appellants, cited: *State, ex rel. Damman, v. Commissioners*, 4 Wis. (414) 432, and cases cited; *Kerr v. Day*, 14 Pa. St., p. 112; *Champion v. Brown*, 6 Johnson's Chancery, 398; *Perkins v. Hadsell*, 50 Ill. 218;

Souffrain v. McDonald, 27 Ind. 269; *Hall v. Center*, 40 Cal. 63; *Hibbeler v. Gutheart*, 12 Neb. 526; *Hurd v. Hall*, 12 Wis. 136.

Charles O. Whedon, for appellees, cited: *Gay's Case*, 5 Mass. 419; *Rogers v. Redick*, 10 Neb. 332.

REESE, CH. J.

As shown by the pleadings and proof in this case, Richard J. Mulloy died in the year 1884, in Holt county, being at that time the holder of leases from the state for the northwest quarter of the northeast quarter, and the west half of the northwest quarter of section sixteen, township eleven, range seven, in Lancaster county, said land being a part of the school lands of the state.

Administration was duly granted upon his estate by the county court of Holt county, and it was found that the indebtedness exceeded the moneyed assets in the administrator's hands, whereupon the county court entered an order for the sale of the school land leases referred to. The leases were on deposit in a bank in the city of Lincoln, but this fact was unknown to the administrator, who, supposing them to be lost or destroyed, procured duplicates thereof to be issued by the commissioner of public lands and buildings. These duplicates were assigned by the administrator to J. W. Boggs, who afterward surrendered them to the state and purchased the land. Through *mesne* assignments, the contracts of purchase were transferred to defendant in error Kyle, who, without knowledge of any other claim upon the land, paid full value therefor. This action is brought by the two surviving brothers of Richard J. Mulloy, as his sole heirs at law, its purpose being to set aside the transfers to defendant, and to decree them to be the owners, the original leases having been found and produced upon the trial. The state officers did not answer, and no default was entered against them.

The decree of the district court was in favor of defendants, from which plaintiffs appeal.

There seems to be but little, if any, contention over the facts in the case.

It appears that the granting of administration by the county court of Holt county, and all orders made subsequent thereto, with the exception of the one complained of, were legally and properly made, and that the purchase from the administrator was for full value and in good faith.

It is contended, however, that the county court had no jurisdiction or authority to order the sale of the leases by the administrator, as personal property, and this contention presents the questions: 1st, whether a lease of real estate for years is personal property, and upon the death of the lessee passes to the executor or administrator, or whether it is real estate and descends to the heirs; and 2d, whether the option given to the lessees of school land to purchase under the conditions prescribed by law is a contract for the sale of real estate under the provisions of section 94 of chapter 23 of the Compiled Statutes.

Assuming, 1st, that the leases issued by the proper officers of the state to Richard J. Mulloy, for a term of twenty-five years, are in no sense contracts for the purchase of real estate, we inquire whether such leases creating an estate for years would descend to the heirs at law of the lessee, or vest in the executor or administrator as personal property? At common law there can be no doubt upon this question, as the rule is universal that such leases would vest in the executor or administrator as personal property. (See *Kile v. Giebner*, 114 Pa. St. 381; *Teideman on Real Property*, sections 171, 174, 176, and 184; 1 *Washburn on Real Property*, section 17 p. 21, section 15 p. 494, sections 7 and 8 p. 472; *Martindale on Conveyancing*, 258, citing *Ex parte Gay*, 5 Mass. 419, and *Brewster v. Hill*, 1 N. H. 350; 4 *Kent's Commentaries*, 94; *Willard on Executors*, 259; *Williams on Real Property*, *9 and *10; *Williams on*

Executors, 746, *et seq.*; 6 Am. & Eng. Encyc. of Law, title, Estates, V, [Estates for Years,] and cases cited in note.)

From these citations it is clear that a lease for a term of years is chattel or personal property, and will vest in the executor or administrator, no matter how long the term. We are unable to find anything in the law of this state which changes this rule.

Our attention is called to section 44 of chapter 73 of the Compiled Statutes, entitled Real Estate, which is, that "The term real estate, as used in this chapter, shall be construed as coëxtensive in meaning with 'lands, tenements, and hereditaments,' and as embracing all chattels real, except leases for a term not exceeding one year."

The provisions of this section are limited to the chapter in which they occur, and which constitute the law governing the conveyance of real estate, the execution, acknowledgment, authentication, registration, and recording, of deeds; recording of wills, bequeathing real estate; the entering, recording, etc., of judgments; discharge of mortgages, etc.; but we are unable to see that the provisions of the section referred to are intended in any degree to control or modify the rule above cited. The law governing the estates of decedents is silent upon the subject; the rule of the common law must therefore obtain.

2d.—Section 94, of chapter 23, provides that: "If a deceased person, at the time of his death, was possessed of a contract for the purchase of land, his interest in such land, and under such contract, may be sold, on the application of his executor or administrator, in the same manner as if he had died seized of such land, and the same proceedings may be had for that purpose as are prescribed in this subdivision in respect to lands of which he died seized, except as hereinafter provided."

It is claimed by plaintiff in error that the leases referred to come within the provisions of this section, for the

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reason that the lessee has an option to purchase the leased premises.

This option, it may be observed, is not given in the lease itself, but as a general provision of law. (Sec. 15, ch. 80, Comp. Stat.)

The provision is, that a lessee may apply in writing to the chairman of the county board to have the land embraced in his lease appraised for the purpose of sale. After such appraisement, the lessee may pay the county treasurer the appraised value of the land, and he shall then be entitled to receive a deed therefor, providing the land shall not be sold for less than \$7 per acre. It is provided by section five of the same chapter, that upon an appraisement of school land, the commissioner of public lands and buildings shall, by himself or agent, attend at such times as the board may direct, but not more than once in one year, and offer the unsold lands at public auction. At this sale all persons are permitted to bid and buy. But by the provisions of section fifteen, the right is reserved to the lessee. Until he avails himself of that right he has nothing but a lease. The right is given solely by law. Even after appraisement, as provided by section fifteen, above cited, the lessee is under no obligation to purchase; he can pay the expenses of the appraisers and take no further action in the matter. We find nothing in the section which would change the character of the lease. We hold, therefore, that the order of the county court was within its jurisdiction, and that the sale made thereunder, having been made in good faith and for full value, conveyed the interest of the lessee to the assignee, and divested the estate of its interest in the leases. The decree of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

PHILIP DICKERSON, APPELLEE, v. CHARLOTTE P.
DICKERSON, APPELLANT.

[FILED APRIL 10, 1889.]

Divorce and Alimony. Under section 22, chapter 25, Compiled Statutes, a district court or supreme court, upon appellate proceedings, (in the same case,) may, after a divorce is granted at the suit of the husband, make a decree for alimony in favor of the wife, out of the property of the husband, even though the decree of divorce be against the wife, for any of the enumerated causes except the adultery of the wife.

APPEAL from the district court of Johnson county.
Tried below before CHAPMAN, J.

Daniel F. Osgood, for appellant, cited: *Bishop on Marriage and Divorce*, vol. 2, sec. 378-379; *Sheafe v. Laighton*, 36 N. H. 240; *Sheafe v. Sheafe*, 4 Fost. (Id.) 564; *Reavis v. Reavis*, 1 Scam. 242; *Pence v. Pence*, 6 B. Mon. 496; *McCafferty v. McCafferty*, 8 Blackf. 218; *Gaines v. Gaines*, 9 B. Mon. 295, 303; *Lovett v. Lovett*, 11 Ala. 763; *Hedrick v. Hedrick*, 28 Ind. 291; *Reeves on Domestic Relations*, p. 329.

B. F. Perkins, and *S. P. Davidson*, for appellee, cited: *Shafer v. Shafer*, 10 Neb. 468, 472.

COBB, J.

This cause originated in the district court of Johnson county. On October 1, 1888, plaintiff filed his petition in the district court for said county, in which he alleges that he is, and for more than twenty years has been, a citizen and resident of said county; that he was married to defendant on the 22d day of August, 1861; that he ever after that date, till the commission of the wrongs below mentioned, conducted himself toward the defendant as a faithful, kind,

Dickerson v. Dickerson.

and indulgent husband; that on the 10th day of April, 1886, defendant, without any just cause or provocation, abandoned and deserted plaintiff; that she then removed to, and has ever since made, her home in the state of Arkansas; that plaintiff has since repeatedly urged the defendant, in the kindest and most affectionate manner, to return to his home in said county, and resume her marital relations with him, but, notwithstanding his repeated and urgent requests to return and live with plaintiff, defendant has continued to refuse and still does refuse to do so, and has deserted plaintiff, for more than two years last past, without any just cause or provocation; that there are no children as the fruit of said marriage; and therefore plaintiff prays for a divorce and that he may recover his costs.

Defendant in her answer —

1. Denies each and every allegation of the petition, except that setting up the marriage and that there are no children.

2. Alleges that on April 10th, 1886, defendant left plaintiff on account of the abuse, insults, and taunts, of plaintiff.

3. Alleges that when the parties were married, plaintiff had no property whatever, and defendant had only a limited supply of household goods; that in the year 1866, plaintiff took as a homestead the west half of the northwest quarter of section thirty-two, and the east half of the northeast quarter of section thirty-one, in town four, range eleven east, in said county, which the parties jointly cultivated, and plaintiff still holds the title thereto free of incumbrance, except \$300; and plaintiff also owns personal property of the value of \$2,000; and said land is worth \$6,000; all of which is the joint accumulation of plaintiff and defendant; and defendant prays that she may be decreed a separate living from plaintiff, and alimony in the sum of \$4,000 and costs of suit, and for general relief.

The reply is a general denial.

The cause was tried November 19, 1888, and the court found all the issues in favor of plaintiff, and rendered a decree of divorce as prayed in favor of plaintiff. The cause is brought to this court, by the defendant, by appeal.

The plaintiff also at the same time appealed to this court from an order made by the district court, requiring the plaintiff to pay certain attorneys' fees to the defendant, and certain costs in the case. As to the appeal of the plaintiff, it is deemed sufficient to say that neither the order requiring the plaintiff to pay attorneys' fees, or suit money, nor the affidavit on application on the part of the defendant upon which such order, if any, was made, appears in the record; and as to the judgment requiring the plaintiff to pay costs, the awarding of costs is so much a matter of discretion on the part of the trial court, that except where there is a clear abuse of discretion, which is not shown to exist in this case, an appellate court will rarely, if ever, disturb it.

In the main case brought upon appeal by the defendant, although the evidence is conflicting as to the cause of the separation of the parties, it is sufficient to sustain the finding of the trial court, that the defendant willfully abandoned the plaintiff without just cause, for the term of two years. The only question for our consideration then is that of alimony.

Section 22 of chapter 25 of the Compiled Statutes provides as follows: "Upon every divorce from the bonds of matrimony, for any cause excepting that of adultery committed by the wife, and also upon every divorce from bed and board, from any cause, if the estate and effects restored or awarded to the wife shall be insufficient for the suitable support and maintenance of herself and such children of the marriage as shall be committed to her care and custody, the court may further decree to her such part of the personal estate of the husband, and such alimony out of his

estate, as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case."

The statutes of the states of New Hampshire, Illinois, Indiana, and Alabama, contain provisions similar in effect to the above. Under that of the first-named state, in the case of *Sheafe v. Sheafe*, 4 Fost. 564, cited by counsel for appellant, the court granted an allowance in the nature of alimony to a wife divorced on the ground of adultery. I quote from the syllabus: "Under section 13, chapter 148, Revised Statutes, this court may, after a divorce is granted upon the libel of the husband, make a decree for alimony in favor of the wife, out of the property of the husband, even though the decree of divorce be against the wife." It should be remarked that the statute of New Hampshire does not, like our own, contain an exception against cases where the divorce is granted for the cause of adultery committed by the wife.

Under the statute of Illinois in the case of *Reavis v. Reavis*, 1 Scam. 242, a divorce was granted in an action against the wife for the cause of desertion. In subsequent proceedings, without disturbing the decree of divorce, a supplemental decree was rendered for alimony in favor of the wife. The court in the syllabus says: "The final judgment of the court should have decreed a yearly allowance commensurate to the support of the wife and child in proportion to the husband's ability and her condition in life."

Under the statute of Indiana, in the case of *Coon v. Coon*, 26 Ind. 189, a decree of divorce was rendered in an action by the husband against the wife, for the cause of abandonment. She was allowed alimony. The court in the opinion says: "Alimony may, under the statute, be allowed to the wife even when the divorce is granted to the husband for her misconduct."

And under the statute of Alabama, in the case of *Lovett*

v. Lovett, 11 Ala. 763, which was an action against the wife for divorce on the ground of abandonment, a decree of divorce against the wife, but allowing her alimony to the amount of one-third of the personal estate of the husband, and the use of one-third of his land during her life, was approved and affirmed.

In the case at bar, the age of the appellee does not appear from the record. The appellant was, at the time of giving her deposition, which was read on trial, fifty-five years of age. They were married in the year 1861, at which time they were each substantially without means. They soon afterwards took up a homestead on the government land, on the line between Johnson and Pawnee counties, where they made their home together for twenty years, and where together they jointly accumulated all the property of which the appellee is now in possession. When the appellant abandoned the appellee, about three years ago, she took with her property not exceeding a hundred dollars in value, and she doubtless stated the truth in her deposition when she testified that she was then entirely without means to live upon, and was solely dependent upon her son for a living. The amount and value of the appellee's property is not shown as clearly by the record as it should be, nor as it might have been had the appellee answered the questions put to him on his cross-examination in that regard, with more freedom and clearness.

From all the evidence I think it safe to place the value of the appellee's real estate at four thousand dollars and his personalty at one thousand dollars. There should have been evidence of the annual or rental value of the use of this property, but there is none in the bill of exceptions.

While there is no purpose on the part of this court to question the justness of the decree of the district court in granting the divorce for the cause set out in the petition and proved at the trial, we are all of the opinion that the appellant is entitled to some measure of alimony. Neither

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the letter nor spirit of the statute, a due regard to natural equity, nor the good policy of society, will permit of a rule that would deny her this. While the title to the earnings and accumulations of a family is usually vested in the husband, in equity and justice he holds them, in part, in some measure, in trust for the family as such, and when the tie that binds the family is severed by the interposition of the law, even for any fault, save one of the wife, he will not be permitted to retain all, even of a modest competence, while she is put away to the charity of the world.

The decree of the district court will therefore be modified in this court by adding to the decree of divorce, that the appellee pay to the appellant as her reasonable alimony, the sum of fourteen hundred dollars, in manner following: two hundred dollars within one year from the date of the filing of this opinion, and two hundred dollars at the end of each year thereafter, until the entire and full sum of fourteen hundred dollars be paid, the said payments, and each of them, to be without interest.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

L. R. DOWNING, PLAINTIFF IN ERROR, v. S. R. GLENN
AND J. H. GLENN, DEFENDANTS IN ERROR.

[FILED APRIL 10, 1889.]

1. **Petition examined, and held,** sufficient when assailed after judgment.
2. **Evidence examined, and held,** under the issues as formed by the pleadings, sufficient to sustain the verdict.
3. **Instructions.** Objections to instructions, or to the want thereof, not made to the district court, cannot be entertained by the supreme court.

25	323
42	345

ERROR to the district court for Kearney county. Tried below before GASLIN, J.

Joel Hull, and Calkins & Pratt, for plaintiff in error.

J. L. McPheeley, and J. M. Stewart, for defendants in error.

REESE, CH. J.

This was an action to recover an amount alleged to be due on a promissory note. The note was payable to Fuller & Johnson, or order, and had not been transferred to plaintiff except by indorsement made by himself, and there was no direct allegation in the petition that it was the property of plaintiff. For this reason it is insisted that the petition did not state facts sufficient to constitute a cause of action.

The allegations of the petition were in substance that defendants were indebted to plaintiff upon the note which was attached to the petition, and that there was due plaintiff from defendants \$66.60, with interest, etc., for which judgment was demanded.

While the petition was quite informal, yet it must be held sufficient after judgment. It might no doubt have been assailed by motion under the provisions of section 125 of the Civil Code, and an order would doubtless have been made requiring plaintiff to make it more definite and certain; but in default of such objection, and in view of section 121, Id., which requires the petition to receive a liberal construction, and as no attack was made upon it, and the answer of defendants in direct terms alleged that the note was not the property of plaintiff, but was the property of Fuller & Johnson, thus forming an issue upon which the case was tried, we do not think that defendant can now be heard to insist upon the alleged defect in the pleading.

The note was given for twine, to be used in connection

Downing v. Glenn.

with a harvester in binding grain, and for freight paid upon a harvester purchased by defendants from Fuller & Johnson, through plaintiff, as their agent. It was shown that the harvester failed to comply with the warranty given by Fuller & Johnson at the time of its purchase, and that it was returned to them, whereupon they agreed to surrender to defendants the three notes for \$105 each, given for the purchase price; but that instead of returning the notes as agreed, they sold and transferred one before its maturity, and that defendants had it to pay. These facts were pleaded in the answer, together with the averment that the note in suit belonged to Fuller & Johnson, and a set-off was presented with prayer for a judgment for the balance to be found due defendants. Upon these issues the cause was tried, the trial resulting in a verdict and judgment in favor of defendants.

We have carefully examined all the evidence, and cannot see that there was not sufficient to sustain a finding by the jury that the note was originally given to Fuller & Johnson as payees, and that plaintiff so represented to defendants at the time of its execution, as well as through another person, who, by direction of plaintiff, presented it for payment after its maturity as the property of Fuller & Johnson, as testified to by defendants.

Some objections are made to the instructions given to the jury by the trial court, but as no objection was made at the time, nor in the motion for a new trial, they cannot here be considered.

As contended by plaintiff, the record shows that the case did not receive that degree of care upon its trial which might have been desired; yet it seems to have been satisfactory to the parties at the time, and we do not see that we can now interfere.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

C. G. SPRAGUE, PLAINTIFF IN ERROR, v. NATHAN H. WARREN ET AL., DEFENDANTS IN ERROR.

[FILED APRIL 10, 1889.]

1. **Negotiable Instruments: CONSIDERATION.** In an action on a promissory note, the defense being that it was given for losses sustained by the sale of options on corn in Chicago, the testimony showed that the persons purchasing the corn were young men employed as clerks in the town of A., Nebraska, and that they had little or no property; that they purchased 5,000 bushels of wheat in Chicago, through commission men, and gave the commission men in Chicago a draft for \$250, as margins; that the wheat deal resulted in a profit to the purchasers. A second wheat deal also resulted in a small profit. An order was thereupon given to purchase 5,000 bushels of corn, and the aforesaid \$250 was continued as a margin. A decline in the price of corn absorbed the margin, and a further decline left the purchasers indebted to the commission men, for which the note in suit was given. *Held*, That where there was no intention of the parties to purchase and receive the grain, and no intention of the sellers to deliver the same, no recovery could be had on the contract.
2. ———: **WAGERING CONTRACT.** In considering such contracts, although the outward forms of law may have been complied with, yet where the defense is that the contract is a wagering one, and not intended for the actual sale and delivery of property, it is the duty of the courts to go behind the contract and examine the facts and circumstances which attended the making of it in order to ascertain its true character.
3. ———: ———: **EVIDENCE.** Where doubt is cast upon the validity of the contract by the testimony, it is the duty of the party claiming any rights under it to make it satisfactorily and affirmatively appear that the contract was made with the intention to deliver the grain.
4. ———: ———: ———. Where a commission merchant testifies that he never had a warehouse receipt for grain in a warehouse, which he claimed to have purchased on the order of certain parties residing at A., in this state; that he did not know in what elevator the alleged grain was which he claimed to have purchased, and that he settled the alleged losses by "ringing up" in the board of trade, *held*, that his testimony failed to show a *bona fide* purchase of grain for actual delivery.

96	326
37	473
27	475
96	326
37	785
26	326
159	775

ERROR to the district court for Kearney county. Tried below before GASLIN, J.

J. L. Mc Pheely, William Leese, and J. M. Stewart, for plaintiff in error, cited: *Cobb v. Prell*, Am. Law Register, N. S., vol. 22, p. 609; *Rudolf v. Winters*, 7 Neb. 125; *Lowry v. Dillman*, 59 Wis. 197; *Wall v. Schneider*, Id. 352; *Murry v. Ocheltree*, 59 Iowa, 435; *Barnard v. Backhaus*, 52 Wis. 593; *Tomblyn v. Callen*, 28 N.W. Rep. 573; *First National Bank v. Oskaloosa Packing Co.*, 23 Id. 255.

Calkins & Pratt, for defendant in error, cited: 1 Greenleaf Ev., sec. 45, p. 200; *Michel v. Ware*, 3 Neb. 229; Comp. Stat. 1887, sec. 13, chap. 92.

MAXWELL, J.

This action was brought in the district court of Kearney county by the defendants in error against the plaintiff in error upon the following instrument:

"\$351.02

MINDEN, April 18, 1883.

"On the 18th day of April, 1885, for value received, I promise to pay to the order of N. H. Warren & Co., Three Hundred and Fifty-one and $\frac{9}{10}$ dollars, at Chicago, with interest equal to ten per cent per annum from date until paid, together with a sum equal to ten per cent of amount due as liquidated damages, if action is brought on this note or on the mortgage given to secure the same, or if the same is not paid when due.

C. G. SPRAGUE.

"No. of this date.

"P. O. Address

"Date due, April 18, 1885."

The defendant in his answer "Admits the execution of the said note sued upon, described, and set forth, in petition of plaintiffs herein, but denies that he is indebted to plaintiffs on said note and said cause of action set forth in the

petition, in the sum of \$351⁰²/₁₀₀, and interest, or in any other sum.

"Defendant, for further answer and defense, herein complains of the plaintiffs and says that heretofore, on the 1st day of February, 1882, plaintiffs were commission merchants in Chicago, Illinois; that plaintiffs at said time, in the firm name of N. H. Warren & Co., dealt and traded in what are known as options, on 'change, in Chicago, in grain, by selling and buying in market on 'change certain grain for future delivery, when in fact no delivery was ever intended or demanded, and no grain was bought or sold, or intended to be; that on said date defendant took an option of said plaintiffs on grain as aforesaid for future delivery, when in fact no delivery was ever intended or demanded, and no grain was bought or sold, or intended to be; that the whole transaction was a venture and speculation on margins, depending for profit or loss on the fluctuations of the market, and purely a fictitious and gambling transaction; that in such and said transaction no consideration was received; that the said note sued upon herein was given for loss in so trading in said options, at said time as aforesaid, and is without consideration and wholly void, which plaintiffs well knew, in violation of the law and contrary to public policy."

On the trial of the cause the jury returned a verdict in favor of the defendants in error, and a motion for a new trial having been overruled, judgment was entered on the verdict.

The testimony shows that in December, 1882, the plaintiff in error and one Daniel W. Fisher were young men employed as clerks, and without capital, and resided at Aurora, in Nebraska. In December of that year they sent a telegram signed C. G. Sprague & Co. to the defendants in error at Chicago to purchase 5,000 bushels of wheat for them, which, it is claimed, was done. The defendants in error were engaged in business as grain and commission mer-

chants at Chicago, Illinois. Sprague & Co. were required by the defendants in error to put up a margin of two hundred and fifty dollars. This they did. This wheat deal was closed out about January 23, 1883, the profit being two hundred and seventy-five dollars. Sprague & Co. therefore directed the defendants in error to make a second purchase of 5,000 bushels of wheat, the former margin of two hundred and fifty dollars to remain to their credit as a margin. This wheat deal was closed out a few days afterwards, the net profits of Sprague & Co. being twelve dollars and fifty cents. In neither of these cases had the wheat been delivered to Sprague & Co. On the 27th of January, 1883, Sprague & Co. directed the defendants in error to purchase for them 5,000 bushels of February corn; the two hundred and fifty dollars heretofore spoken of to remain as a margin. Fisher testifies that Sprague & Co. directed the defendants in error, as soon as the corn deal was closed out, to purchase for them 5,000 bushels of May wheat; that the defendants in error did not wait for the closing of the deal, but purchased 5,000 bushels of May wheat; and that as the price declined, and heavy demands were made upon Sprague & Co. for margins, Sprague assumed the corn deal, and Fisher the deal in wheat; and the note in question was given by Sprague for alleged losses in the sale of the corn. The deposition of Nathan H. Warren, one of the defendants in error, was taken in the case, and on cross-examination he testifies as follows :

A. We do sometimes deal in options in the future; the firm.

Q. Now will you please answer my first question? Do you know from your experience on the board whether the bulk of the transactions there, in grain, consists of speculations in the future?

A. My impression is there is a good deal; I have no means of knowing.

Q. Are all the contracts in question, which you have testified to, what are known as deals in future options?

A. None of them are.

Q. Will you explain what is meant by that phrase, "dealing in future options"?

A. Dealing in future options is where you have option to take the grain or not. The contract is where you contract to take it.

Q. Was any of the wheat or grain purchased by you under the orders you have testified to, delivered, to your knowledge?

A. The grain was delivered.

Q. Which grain?

A. There was but one 5,000 bought.

Q. From whom was that grain purchased?

A. J. B. Peabody & Company.

Q. When?

A. On the 27th of January.

Q. Where?

A. On the board of trade in Chicago.

Q. What was done with the grain when it was purchased?

A. It was paid for on the first of February. It was February delivery.

Q. Question repeated. Now please answer.

A. It was purchased on the 27th of January for delivery in February. In February it was paid for.

Q. Question repeated. Now please answer. What was done with the grain when it was purchased?

A. That is an idiotic question; what was done with the grain when it was purchased in January for February delivery.

Q. Nevertheless, I ask you to state again what was done with the grain when it was purchased.

A. It was taken in and paid for in the office.

Q. Taken into what office?

A. Into my office.

Q. The grain was?

A. The grain is represented by receipts for grain.

Q. What did you do with it then?

A. We carried it.

Q. Now, please state what became of the grain.

A. It was sold on the 18th day of April.

Q. Was it delivered to you?

A. It was.

Q. When?

A. On the 1st day of February.

Q. What did you do with it then?

A. We carried it.

Q. Where did you put it?

A. We probably put it in the bank.

Q. The grain?

A. The receipts.

Q. I am now asking you about the grain itself. Do you know what became of the grain which you purchased?

A. It was kept in the elevators of the city.

Q. In what elevator?

A. I do not know. In a regular elevator. It was stored in a regular elevator. I do not know which particular elevator it was stored in. It makes no difference.

Q. If the 5,000 bushels of grain now in question were ever delivered to you, state when and where.

A. At my office. The first day of February.

Q. Did you ever see, or handle, or store, the grain yourself? and if so, where?

A. I am not a storer of grain.

Q. Did any one in your employ, to your knowledge, or any agent of yours, receive or store this grain, or any one for you?

A. No.

Q. Did you ever pay any storage charges?

A. We did.

Q. To whom?

A. We paid it to G. H. Sidwell & Company.

Q. Who is he?

A. He is a commission merchant on the board of trade.

Q. Has he a storage house for storing corn?

A. Not that I know of.

Q. Did you ever pay any elevator charges on this corn?

A. No, not to elevator proprietors.

Q. Did you ever pay them to any one, if not to an elevator proprietor?

A. We did. We paid them to Mr. Sidwell.

Q. For what elevator proprietor?

A. We don't know.

Q. When was this payment of allowance made to Sidwell?

A. When the grain was sold; on the 18th of April.

Q. When you sold the grain, state how and when and where you delivered it.

A. We delivered it to Mr. Sidwell, on the 18th of April, 1883, at his office.

Q. How?

A. By the receipts.

Q. By what receipts?

A. By the receipts representing 5,000 bushels of regular grain stored in Chicago regular elevators.

Q. What elevator, if any; do you know?

A. I do not know what they were in; they were simply regular. It is all that is required.

Q. Did the storage receipt contain the name of no elevators?

A. Yes.

Q. What?

A. I don't know.

Q. Then you don't know, as a matter of fact, where the grain was stored from the time you bought it until you sold it?

A. I don't know now. I knew at the time. It was immaterial where it was stored. It was in a regular elevator.

He also further testifies:

Q. You were asked in your cross-examination if you or any of your firm saw the corn or wheat that were purchased under these transactions. You may state what is the course of dealings in regard to certificate or warehouse receipts in buying and selling grain in Chicago; whether by certificates, and what the certificates represent.

A. The grain comes in by rail, and is received and placed in elevators. The proprietors issue certificates or warehouse receipts. These warehouse receipts are what represent the grain bought and sold and delivered.

Q. You may state whether these warehouse receipts are transferable by indorsement?

A. They are.

Q. In purchasing grain in the warehouse, what, then, is the actual transaction?

A. After the purchase is made the warehouse receipts are delivered.

Q. To whom?

A. To the purchaser, upon payment of price agreed upon.

Q. Did you receive any warehouse receipt for the first 5,000 bushels purchased for the defendants?

A. No; I would not have taken them if they had been presented to me. No, I did not.

Q. Why would you not have taken them had they been presented?

A. Because I would have had to carry them until May, when we had bought them carried for us until May.

Q. Then when you purchased the grain under the orders in question, you did not receive the receipt, as you have testified is customary. Is that so?

A. No; it was ordered sold before the time for receiving them.

Q. I understand you to say, when the grain is purchased, the warehouse receipts are delivered. Is that so?

A. The contract for May delivery, when May comes, we receive them, the warehouse receipts; the grain, represented by receipts.

Q. Then it is not customary on purchasing grain to receive the warehouse receipts; but only on delivery. Is that so?

A. The warehouse receipts do not pass until the time for delivery has arrived. The contract expired.

Q. That is, when making the contract for a future delivery, you would be entitled to the grain or warehouse receipts at the time of delivery and not before?

A. Yes, sir.

There is a large amount of testimony to the same effect. Sprague & Company were residents of a town in the interior of this state, from which corn was constantly shipped to Chicago, it being one of the staple products of the state. Sprague & Company therefore did not desire corn for the purpose of shipping it west into the state, and this fact must have been well known to the defendants in error. Sprague & Fisher both testify that they did not desire the grain, and it will be seen by an examination of the testimony of Mr. Warren that he purchased no grain for them. He says he had no warehouse receipt and did not want any; that the warehouse receipt would be delivered when the grain was paid for. If the grain had been purchased *bona fide* as being in one of the elevators in Chicago, a warehouse receipt, or some written evidence issued by the warehouse company, would have been delivered to the purchaser.

Nothing of this kind, however, was received by the defendants in error. This, to our mind, shows the want of good faith in the purchase. In addition to this, we find that the credit of two hundred and fifty dollars, deposited by C. G. Sprague & Company with the defendants in error,

for margins on wheat, in January, 1883, was carried forward as a margin on the corn deal in question. There is no pretense on the part of the defendants in error that they had purchased and paid for the corn. All that the testimony shows is a mere right to purchase, which was not settled by the payment of money, but by "ringing up." The rule is well established that when the parties to an executory contract for the sale of property do not intend that the property shall be delivered, but that the transaction is to be settled by the payment of the difference between the contract price and the market price of the article at a time stated, the contract is void. (*First National Bank v. Oskaloosa Packing Co.*, 23 N.W. Rep. 255; *Gregory v. Wattowa*, 58 Iowa, 711; same case, 12 N.W. Rep. 726; *Murry v. Ocheltree*, 59 Iowa, 435; same case, 13 N.W. Rep. 411; *Pizley v. Boynton*, 79 Ill. 353; *Logan v. Musick*, 81 Id. 415; *Corbett v. Underwood*, 83 Id. 324; *Bigelow v. Benedict*, 70 N. Y. 202.) Real contracts for the delivery of property at a future time will be sustained, because parties then deal with actual property. Where, however, there was no intention to deliver the property, but simply to pay the difference between the contract price and the price on the day agreed upon, the contract will not be enforced, as in fact it is a mere wager. It is the duty of courts and juries, therefore, to scrutinize these time contracts very closely, and see whether they were really intended by the parties as contracts for the purchase and delivery of the property.

Neither will it do to attach too much importance to the form of the instrument, for it is always possible for the parties to conceal the true nature of the transaction by complying with the outward forms of the law. It is the duty of the courts, therefore, where the validity of the contract is challenged, to receive evidence outside of the words of the contract, and examine the facts and circumstances which attended the making of it, in order to ascertain, if possible,

whether it was intended as a *bona fide* transaction for the purchase and delivery of the property, or merely colorable. In *Barnard v. Backhaus*, 9 N.W. Rep. 596, the supreme court of Wisconsin says: "And to justify a court in upholding such agreement, it is not too much to require a party claiming rights under it, to make it satisfactorily and affirmatively appear that the contract was made with an actual view to the delivery and receipt of grain, not as an evasion of the statute against gaming, nor as a cover for a gambling transaction." Sprague and Fisher were young men in the employ of others, and without capital. They ordered the purchase of a large quantity of grain in Chicago. The defendants in error made no inquiry, so far as it appears, as to their business standing and financial ability. All that they required in the first instance was a margin of two hundred and fifty dollars; and, so far as appears, had the difference between the purchase price and the market price been kept good—that is, had money to pay these losses been furnished—the transaction might have run for years. The case has all the ear-marks of a gambling transaction, and it devolves upon the defendants in error to show that the purchase of the grain was *bona fide*, and for actual delivery. This they failed to do, and the verdict is against the clear weight of evidence. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

COBB, J., concurs.

REESE, CH. J., dissents.

J. N. CARLILE & CO. PLAINTIFFS IN ERROR, V. H. B.
DAUCHY, DEFENDANT IN ERROR.

[FILED APRIL 10, 1889.]

1. **Railroads: CONTRACT FOR GRADING: WORK AND LABOR.** C. & Co. were contractors to grade the road-bed of a certain railway, and sublet a portion of the contract to one D. D. was insolvent, and had taken the contract for less than the amount required to grade the same. C. & Co., finding the amount due for labor exceeded the estimates, and to prevent the filing of liens against the railway, which they had agreed to prevent, demanded and obtained from D. the pay-rolls, and undertook to pay the hands employed by D. One B. D., having rendered services for D. as foreman on said contract, and with his team, presented his account for such services to C. & Co., who paid only in part: *Held*, That C. & Co. were liable for such services.
2. ———: ———: **CONSIDERATION.** The prevention of filing liens for services rendered in grading the railway was a sufficient consideration between employes of such subcontractor in grading the railway road-bed, and the contractor, who had agreed to save the railway company harmless from such liens.

ERROR to the district court for Otoe county. Tried below before CHAPMAN, J.

Frank T. Ransom, for plaintiff in error, cited: Bliss on Code Pleading, secs. 268, 279, note 7, and 308; Wait's Actions and Defenses, vol. 1, p. 90; *Bailey v. Freeman*, 4 Johns. 280; *Gyle v. Shoenbar*, 23 Cal. 538; *Morrissey v. Kinsey*, 16 Neb. 17; *Brown v. Weber*, 38 N. Y. 187.

John C. Watson, and *George B. Schofield*, for defendant in error, cited: *Crawford v. Edison*, 13 N. E. Rep. 80; *Wilson v. Smith*, 35 N.W. Rep. 506; *Green v. Burton*, 10 Atl. Rep. 575; *Maurin v. Fogelberg*, 32 N.W. Rep. 858.

MAXWELL, J.

The defendant in error brought an action against the plaintiffs in error to recover for certain services performed

by him. On the trial of the cause he recovered a judgment for the sum of \$181 and costs. The cause of action is stated in the petition as follows: "Plaintiff complains of the defendants, and for cause of action alleges: That on or about the 10th day of July, 1887, one A. J. Dauchy was employed by these defendants as a subcontractor on the Talmage branch of the Missouri Pacific railroad, in the construction of said road; that the said A. J. Dauchy, as such subcontractor, employed men and teams to aid in the construction of said road; and that the defendants herein agreed to pay for the labor of the men and teams so employed by such subcontractor, and did pay a part thereof; that on or about the first day of August, 1887, plaintiff commenced work for said subcontractor at his request, and performed the labor by himself, and with his team, as set forth and itemized in the statement set forth in the exhibit attached in these pleadings and made a part of the original petition herein; that said subcontractor promised to pay said plaintiff for his labor the sum of \$2 per day, and for the labor done and performed by his team, the sum of \$3 per day; that there is now due on said account the sum of \$405, no part of which said sum has been paid excepting the sum of \$230, which the said defendants, J. N. Carlile & Co., have paid this plaintiff; that there is now due and unpaid from said defendants to said plaintiff, the sum of \$175 for said labor so performed by himself and his team, together with interest thereon from the first day of December, 1887."

The answer consists of a number of specific denials of certain facts stated in the petition. The testimony tends to show that at the time stated in the petition, one A. J. Dauchy took a contract from the plaintiffs in error to grade a portion of the Talmage branch of the Missouri Pacific railway; that the plaintiffs in error were contractors to grade said branch, or a considerable portion of it, and had sublet a portion of the work to said Dauchy; that

Dauchy was insolvent, and had taken the contract in question for less than the cost of completing the work; that in the contract of the plaintiffs in error with the railway company, there was a provision that they should discharge all liens for work and labor performed in the grading; that the plaintiffs in error, finding that the amount required to pay the hands employed by Dauchy on his contract exceeded the monthly estimates, required Dauchy to turn the payroll over to them, and they would pay the hands. This was done, and all the hands employed by Dauchy have been paid by the plaintiffs in error except the defendant in error. He was employed by Dauchy as foreman of the work on said contract, and rendered services as such foreman in grading the road in question, which, together with the labor of his team, amount to \$405. An itemized copy of the account is attached to the petition as an exhibit. Of the amount due the defendant in error, the plaintiffs in error have paid him \$230, leaving still unpaid the sum of \$175. There is but little dispute in the testimony, and none whatever on the following points: First, that the plaintiffs in error, to avoid the filing of liens upon the railway in question, undertook to pay all the hands employed by A. J. Dauchy, and that they have paid all except the defendant in error; that A. J. Dauchy is insolvent, and unable to pay the defendant in error. A clear preponderance of the evidence shows that the defendant in error rendered the services set forth in the petition, and that the plaintiffs in error undertook to pay such services. The plaintiffs in error claim that there was no consideration for the agreement to pay for the services sued for. We think differently, however, as the undertaking on their part to pay for such services, was to prevent the filing of liens upon the railroad. This was a sufficient consideration.

One George Rebett, who testifies that he was superintendent and general manager of the plaintiffs in error in and about the grading in question, testifies on cross-examination as follows:

Q. Is it not a fact that you told him, (the defendant in error,) that he should never have any of this pay if you could keep him out of it?

A. I might have done that.

Q. Is it not a fact that you did that?

A. I don't know whether I did or not; I would not hesitate to tell him.

Q. You had a fuss with him, did you not?

A. I don't remember.

Q. Don't you remember whether you ever had a fuss with him or not?

A. I don't.

Q. You don't have so many fusses that you don't recollect, do you?

A. I don't remember having any fuss; I don't know what you term a fuss.

Q. You know what a "fuss" is?

A. I don't know what you term a fuss.

Q. Did you ever have a quarrel with him, or have any angry words?

A. I might have had angry words.

Q. You had a quarrel with him, too, did you not?

A. I might have had some angry words with him.

This probably explains the failure to pay the claim of defendant in error. The questions of fact were fairly submitted to the jury, the verdict is fully sustained by the evidence, and it is apparent that justice has been done. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

HENRY VEITH, APPELLANT, v. J. H. MCMURTRY ET
AL., APPELLEES.

[FILED APRIL 10, 1889.]

1. **Contract for Sale of Real Estate.** One P., a resident of New York, being the owner of certain lots in the city of Lincoln, after considerable correspondence with one V., of the latter place, wrote to him, saying: "If you want the lots and take them before February 15, you can have them for \$3,500 cash to me." On the night of February 8, or morning of February 9, 1887, P. telegraphed to V.: "Shall have to withdraw my refusal of to-day and let it expire to-night instead of 15th. This was received by V. about 9 A. M. of the 9th, and at 11 A. M. of said day he sent the following dispatch to P.: "Received your message; accepted your last offer; to make good my refusal, I will pay the \$3,500 cash; send you hereby \$500, and pay balance on delivery of warranty deed." *Held*: 1. That under the terms of the telegram from P., V. had until the night of the 9th to accept the proposition. 2. That the acceptance of the offer of \$3,500 cash was unconditional, and that the proposition to pay \$500 at once before the delivery of the deed was in the nature of a forfeit to show good faith. 3. That as no place was designated in the contract for the payment of the money, it was for the vendor to determine whether the payment should be at his place of residence or in the city where the lots were situated. 4. Where the proposed vendor makes no objection to the terms of payment, a third party cannot do so.
2. ———: **BONA FIDE PURCHASER.** A party who purchases real estate with knowledge that another has a contract of purchase for the same, is not a *bona fide* purchaser; and if he acquires such knowledge at any time before the payment of the consideration, he will not be protected as a purchaser in good faith.
3. ———: **SPECIFIC PERFORMANCE.** If A enters into a contract to sell land to B, and without complying with the contract sells the land to C, B may compel the purchaser to convey to him, provided he is chargeable with notice at the time of his purchase of B's equitable title under the agreement.
4. ———: ———. A purchaser with notice is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree. He takes the estate subject to the charge, and stands in the place of his vendor.

APPEAL from the district court of Lancaster county.
Heard below before CHAPMAN, J.

Billingsley & Woodward, and *J. B. Archibald*, for appellants, cited: *Vassar v. Camp*, 11 N. Y. 44; *Abbott's Trial Evidence*, p. 289; *Iron Co. v. R. R. Co.*, 91 N. Y. 155; *Booth v. Birce*, 38 Id. 463; *White v. Corties et al.*, 46 Id. 467; *O'Neill v. James*, 43 Id. 84; *Story's Equity Jurisprudence*, vol. 2, p. 425, 437.

J. R. Webster, for appellee, cited: *Whitehorn v. Cranz*, 20 Neb. 398; *Richardson v. Hardwick*, 106 U. S. 252; *Quick v. Wheeler*, 78 N. Y. 300; *Smith v. Reynolds*, 3 McCrary, (C. C.) 157; *Faulkner v. Hebard*, 26 Vt. 452; *Gregory v. Cameron*, 7 Neb. 419; *Maynard v. Tabor*, 53 Me. 511; *Curtis v. Blair*, 26 Miss. 309; *Baker v. Holt*, 56 Wis. 100; *Tompkins v. Batie*, 11 Neb. 153; *Horacek v. Keebler*, 5 Id. 357-8; *Robinson v. Cheney*, 17 Id. 673; *Gartrell v. Stafford*, 12 Id. 679.

MAXWELL, J.

This is an action to enforce the specific performance of a contract for the sale of certain real estate in the city of Lincoln. It is brought against the defendants, who, it is claimed, purchased the property with notice of the plaintiff's rights. On the trial of the cause in the court below, a decree was rendered in favor of defendants. The plaintiff appeals.

The questions at issue are to a great extent questions of fact, and to be understood must be set out at length.

In January, 1887, Dr. James L. Perry, of New York City, being the owner of lots 5, 6, 7, and 8, in block 116, in the city of Lincoln, wrote to the plaintiff the following letter:

"JANUARY 31, 1887.

"*Mr. Henry Veith*: DEAR SIR—Your letter has been laid aside to answer, but I have been having rheumatism and have delayed. Will state the facts with regard to the lots. I have an offer for two lots much larger than your offer, and the prospect of selling the four lots very shortly for \$4,000—part cash and part in time. I expect the sale will be made within six weeks; perhaps within four weeks.

"The only way I can favor you is by not closing with any offer for two weeks. If you can make a sale of two of the lots, it will bring your other two to a reasonable and moderate figure. If you want the lots and take them before February 15, you can have them for \$3,500 cash to me. If it will help you any you may have them for \$4,000; \$2,000 down and the rest in three years at six per cent. I make you this offer simply to make it easy for you in case you really want them. They won't be sold for any less to any party. Would as lief have the \$3,500 cash, because I can invest it here to suit me. Your letters have been fair and business-like, and I would sell to you as soon as to anybody in the world, and would give you the preference if I could. Yours very truly, JAS. L. PERRY,

"79 West Forty-seventh street."

This letter seems to have been the result of considerable correspondence between the parties in regard to the sale of the lots in controversy. The plaintiff testifies that upon the receipt of the letter, he made provision to obtain the money. About the time the above letter was received by the plaintiff, Mr. McMurtry seems to have written to him in regard to the lots in question, and received an answer as follows:

"FEBRUARY 7, 1887.

"*Mr. J. H. McMurtry*: DEAR SIR—Your letter received on my return home, and answered by telegraph this morning.

"Have received several letters with offers since you were

here. One party I have been in correspondence with before, and I finally gave him the refusal till February 15; and I do not wish to sell them for less than \$3,500 cash, or \$4,000 on time, and, in fact, have said I would not, as I believe they will bring it; have been offered \$3,200 cash, and \$3,500 on time, but I did not consider it at all. Would prefer \$3,500 cash to \$4,000 time, because I can invest it here readily. * * *

Yours truly,

"J. L. PERRY."

On the 9th of February, 1887, the plaintiff sent a telegram to Dr. Perry, as follows:

"POSTAL TELEGRAPH CABLE CO.

"1:40

"Received at 714 Seventh avenue, Feb. 9. 35 pd.

"Dated Lincoln, Neb., 9th.

"*To Mr. J. L. Perry, 79 West Forty-seventh Street:* Received your message; accepted your last offer; to make good my refusal, I will pay the thirty-five hundred dollars cash; send you hereby five hundred dollars, and pay balance on delivery of warranty deed.

"HENRY VEITH."

The plaintiff testifies in regard to this telegram as follows:

Q. That was on February 9, you say?

A. On February 9.

Q. What did you do in the way of sending money?

A. I paid him in the telegraph office; forwarded five hundred dollars by telegraph to him, to Mr. Perry, and paid for the expense, so it would be sure of their sending and delivering it.

Q. To his office in New York?

A. Yes, sir.

Q. Did you see the defendant James H. McMurtry that day?

A. I met him at the telegraph office.

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Q. State what passed between you and Mr. McMurtry in the telegraph office; state whether or not you saw him there.

A. I had written out the telegram, and was there about 11 o'clock that day.

Q. Well, state now what occurred between you and Mr. McMurtry.

A. Why, I had written out my message to Mr. Perry.

Q. What telegraph office was it?

A. In the Pacific, under the First National Bank.

Q. In this city?

A. In Lincoln. Mr. McMurtry came in; I am not aware whether he noticed me, but I noticed him. I stood, standing at the side of the counter, was just about reading over my message. He asked how much would thirty words cost to New York. I kind of looked up and watched the proceedings a little, without giving any notice that I paid any notice to it. And after Mr. McMurtry was told, why, he began to write. I saw he was writing a message addressed to James L. Perry; I could see that part of it; the same address I was writing to. I saw something was up. I then approached Mr. McMurtry, and said, that you are telegraphing about these lots; that it was no use; I had a refusal and had accepted. When I said this Mr. McMurtry said, "Is that so?" and seemed surprised, and said he had a message from James L. Perry, from New York, and the message was concerning me and the lots, and he would like to show that message to me. I said if it concerns me and the lots, I am willing to see it, and will go down with you. So we went down to Mr. McMurtry's office, and he produced a message from J. L. Perry.

Q. Who asked you to go to Mr. McMurtry's office.

A. Mr. McMurtry asked me to go to the office. He said he had a message concerning me. After we went down to the office, he produced the message, which, apparently, was from James L. Perry; but he did not show me the

whole of it, but held it in his hand and only offered one part of it. The message was dated, and addressed to him, and he held his hand over part of it; and we got then into conversation. He said, "By this message I have a right to sell these lots, and will go through." He told me he had about sold the lots to Mr. Howard. And then, as we were in the office, and passing a little conversation concerning that, I said: "So far as I saw the message, perhaps you are entitled to presume so, provided you see me first, because I had the refusal; and if I don't want them, why, it looks to me as though you were entitled to sell to some other party, as far as I can see the correspondence."

Q. What was said about the commission?

A. I said then: "Rather than have any difficulty I would rather allow you a commission, and not get into collision in this matter;" and he said then he didn't care; it didn't make any difference to him whether his man got the lots or I would get the lots. I would get damages; that is what he said. Mr. Howard came in. I knew his name, but I had no acquaintance with him at that time. I had met him.

Q. Was this the defendant Howard in this case?

A. Yes, sir, the defendant Howard. He stepped into the room, and asked what he wanted with him; and Mr. McMurtry said nothing now, but told him to come in again. Before Mr. Howard left the room I said to Mr. McMurtry, is this the man you have been talking of selling the lots to? Mr. McMurtry said, "No, it is not the Howard; it is another Howard from that." I asked Mr. McMurtry to step into the bank; I had made provision to have the loan in the amount to pay the balance, and that money was to be paid for the property when the deed was delivered. This ended about this conversation. I had a letter that afternoon; I went and showed him the letter. I thought I perhaps could hinder him from getting into collision, and so I showed him the said letter in order to avoid any of his purposes.

Mr. McMurtry does not deny the substance of the above testimony, and the proof fails to show that he had any authority to sell the lots in question. The telegram of the plaintiff above copied was sent in answer to the following night message:

"No. 4.

16—Pd.—Nit.

8:44 A.M. of

"NEW YORK, 9th.

"*Mr. Henry Veith, 909 O street:* Shall have to withdraw my refusal of to-day and let it expire to-night instead of the fifteenth.

J. L. PERRY."

This dispatch was received about nine o'clock A.M. of the 9th, and was evidently intended to give the plaintiff until the night of the 9th to accept; otherwise, the words "let it expire to-night instead of the fifteenth," would be meaningless. A fair construction of this telegram shows that Perry intended to give the plaintiff an opportunity to accept before withdrawing the proposition, and this view is supported by the letters of Dr. Perry, which will be hereafter referred to. But it is said that the plaintiff did not accept the proposition. The answer is, "I will pay the \$3,500 cash; send you hereby \$500, and pay balance on delivery of warranty deed." The proposition to pay \$500 at once we regard as in the nature of a forfeit to show the good faith of the plaintiff, and not as a proposition to change the acceptance. No place had been agreed upon where payment was to be made and the deed delivered. This was a matter, so far as appears, to be left to the convenience of Dr. Perry. On the next day Dr. Perry sent the following telegram to the plaintiff:

"NEW YORK, 10.

"*Henry Veith, 909 O street:* Your offer or money not yet accepted. Will not sell if any difficulty with anyone. Settle that first.

J. L. PERRY."

He thus made no objections to the terms proposed. To

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understand the difficulty spoken of in the telegram, it is necessary to refer to the telegrams and letters to and from Mr. McMurtry. On February 8, he sent the following dispatch to Perry:

"LINCOLN, NEB., 8.

"*J. L. Perry, 79 West Forty-seventh street: Arrange here; pays thirty-five cash; will send papers to you.*

"J. H. McMURTRY."

On the next day he sent a dispatch as follows:

"LINCOLN, NEB., February 9, 1887.

"*Dr. J. L. Perry, 79 West Forty-seventh street: Make warrantee deed at once to David B. Howard and draw at sight. Veith tried to contract with me this A. M.; deed comes you will be all right; if Veith sends draft, return it; he can't hold; Howard can.*

J. H. McMURTRY."

This proposition Dr. Perry refused to accept, and sent a telegram to that effect, and also the following letter:

"FEBRUARY 10, 1887.

"*Mr. J. H. McMurtry, corner O and Eleventh streets, Lincoln, Neb.: As instructions in my letter are not complied with, letter being same date as telegram, and referred to therein, I think Veith ought to have the preference. If sold to Veith I am willing to give you fifty dollars for your trouble, though he has not dealt through you. Would not accept payment in the way requested by you for Howard. When all matters are arranged to my satisfaction, and troubles settled between buyers, will telegraph you that all is right. My letter and telegram especially mentioned that nothing was to be done which would cause difficulties.*

"J. L. PERRY."

In answer to the telegram sent at the same time that the letter was mailed, Mr. McMurtry sent the following:

"LINCOLN, NEB., February 9, 1887.

"*Dr. J. L. Perry, New York: I was surprised this A. M.*

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to receive your telegraph. I had sold the lots and given the contract. If you had not telegraphed Veith at all, and simply signed a deed and sent it, you would have been all right. Veith had no idea of taking the lots till you telegraphed him—then came down. Now if he gives you a telegraph you can tell him wait your letter. Mr. Veith told me he would have got the lots for \$3,000 if I had not interfered then. Well, that is all right. You get your deed here to Howard and record it. Mr. Veith can't hold you for damages nor get any from you. If you will get Howard deed here and recorded, it will be all right. Mr. Howard goes in possession of the lots to-day and also has put your contract on record. The money is in State National Bank waiting deed. Veith has no show at all; he wanted me to let him have the lots this A. M.

"Yours, J. H. MCMURTRY.

"I can say I sold the lots if I can get the deed here and recorded. I will see you have no trouble."

And on the 12th day of February, in answer to the letter above referred to, he wrote the following:

"LINCOLN, NEB., February 12, 1887.

"*Dr. J. L. Perry, New York:* I am sorry I can't do as you wish. I would cancel your contract if I could, and take nothing. Fifty dollars is of small moment to me to have this racket here. First Mr. Veith called on me, and he gave me all the abuse he could because I told you your lots were worth \$3,500. I did just as your letter said for me to do, and in both letters and telegraph I had the right to sell yesterday when I got your telegram. I went to Howard, who is a builder and contractor here, to get him to let up. He said to me: You are a 'nice duck;' advised me to sell my property and buy this to build tenements on yesterday; to-day you come to me and offer me \$50 to let you out, and then his attorney, J. R. Webster, called on me and asked me for my correspondence. I gave them to

him. He immediately commenced suit to compel you to deed, and filed it yesterday. I have the money, all of it, and Webster says he will get the lot; but if you will guarantee the matter we will send the money to New York, as we telegraphed you. I dislike this very much; you can take the \$3,500 and let me out. There is no question on the facts or what you will have to do. I am free to say that this class of business is not what I want. I supposed when I was offering the lots no one else was. If I had supposed so, I would never offered the lots at all. I do not have to sell property and have this trouble. I am well-to-do, have a fine business, and I do not have to do a scalping business for a living. Now, sir, I can do nothing for you at all. I have done all I can; have sold your lots on your orders; have the money—\$3,500. I will pay you on receipt of a deed to Howard. I do not charge you with bad faith to me, but rather with carelessness. You should have telegraphed me different the first time. Yet I would to-day give \$50 if I was out of the matter. Veith is mad because I meddled with his business, Howard because I got him in trouble. This deed will have to come to Howard, and no mistake. The \$3,500 is yours; do as you like. Yours, J. H. McMURTRY."

Indorsed as follows:

"You know, and know well, that Veith can't hold you. He paid you no consideration for the refusal, and you telegraphed withdrawal of the refusal. He came to purchase of me after I had sold. I do not understand you in this matter at all. You get your money, and deed to Howard, and you are in no trouble. Veith is neither in equity or right entitled to this lot."

The proof fails to show that Howard had any valid contract of the lots in question, or that McMurtry had sold the same as stated in these letters; nor would it be material in this case if he had done so. On the 11th of February,

1887, the attorney of the defendants sent the following telegram to Perry :

“Received at 714 Seventh avenue.

“Dated Lincoln, 11, 1887.

“*J. L. Perry, 879 West Forty-seventh street*: McMurtry can't cancel contract; money all paid; suit commenced; deposit warranty deed for David B. Howard, Chem. National Bank, N. Y., and have bank telegraph State National, and we telegraph thirty-five hundred dollars thereon.”

This telegram was duly signed by the attorney for the defendants. An action was actually commenced by Howard on the 11th of February, 1887, against Perry in the district court of Lancaster county to enforce the alleged contract. Perry was notified of the action, and threats were made by the defendants to attach his property here for a breach of the alleged contract. Fearing that he was about to become involved in expensive litigation, he, on the 12th day of February, accepted the money from the defendants, which on that day had been transmitted by telegraphic order from Lincoln, and executed a deed. It is evident that Dr. Perry recognized the binding obligation of his proposition to the plaintiff, and of the acceptance of the same; and the letters of the defendant McMurtry are to a great extent filled with assertions that the contract with the plaintiff was invalid, while that with the defendant Howard was of binding force and effect. Failing to secure the desired result by assertions, they operated upon Perry's fears of an expensive litigation at a great distance from home, and by such means secured the title. The defendant McMurtry was well aware of the plaintiff's rights in the premises at the time he sought to supplant him in purchasing the property, and the testimony tends to show that McMurtry was the agent of Howard throughout the entire transaction. And even if it be admitted that he was not such agent on the 9th of February, 1887, although in our view he was such agent at that time, yet he is clearly

shown to have been Howard's agent prior to the payment of the money. To constitute a *bona fide* purchase for a valuable consideration, it must be without notice, and with the money actually paid. In cases of trust, there must not only be a denial of notice before the purchase, but a denial of notice before payment of the money. (*Jewett v. Palmer*, 7 Johns. Ch. 68; *Harrison v. Southcote*, 1 Atkyns, 538; *Story v. Windsor*, 2 Id. 630; *Savage v. Hazard*, 11 Neb. 327.) In any view we take of the case, therefore, the defendant Howard was well apprised of the plaintiff's rights before completing the contract with Dr. Perry. He is not entitled to protection, therefore, as a *bona fide* purchaser. The rule is well settled that if A enters into a contract to sell land to B, and afterward refuses to perform his contract and sells the land to C for a valuable consideration, B may, by bill, compel the purchaser to convey to him, provided he be chargeable with notice at the time of his purchase of B's equitable title under the agreement. (Lord Macclesfield in *Atcherly v. Vernon*, 10 Mod. 518; 2 Eq. Cas. Abr., 32, sec. 43; *Taylor v. Stibbert*, 2 Ves. jr. 437; *Daniels v. Davison*, 16 Id. 249; same case, 17 Id. 433.) The rule that affects the purchaser is just as plain as that which would entitle the vendee to a specific performance against the vendor. If he be a purchaser with notice, he is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree. The purchaser from the vendor takes the estate subject to the charge; and so, I apprehend, does a purchaser from the vendee, and he is equally responsible in respect to the estate. (*Champion v. Brown*, 6 Johns. Ch. 398.) Mr. Howard, therefore, having purchased the lots in question with notice of the plaintiff's rights in the premises, took the title subject to such rights. He must, therefore, upon payment of the purchase price and interest thereon, convey the lots in controversy to the plaintiff. The judgment of the district

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court is reversed, and judgment will be entered in this court requiring the plaintiff within ten days from this date to pay to the clerk of this court for the use of the defendant Howard, the sum of \$3,500, with interest at seven per cent from the 9th day of February, 1887; and upon such payment being made, that the defendant by a good and sufficient warranty deed convey said lots, free from all incumbrances, to the plaintiff; and in the event of his failure to do so, that the decree operate as such conveyance.

DECREE ACCORDINGLY.

THE other Judges concur.

JOHN J. SERRY ET AL., PLAINTIFFS IN ERROR, V. ALEXANDER CURRY ET AL., DEFENDANTS IN ERROR.

[FILED APRIL 17, 1889.]

1. **DOWER: PETITION: JURISDICTION.** In a petition filed by a widow in the probate court to have dower in the lands of which her husband died seized, assigned to her, the failure to allege in such petition that her right to dower "is not disputed by the heirs or devisees," is not fatal to the jurisdiction of the court.
2. ———: ———: **NOTICE.** When a petition for dower is filed, it is proper for the judge to enter an order directing the manner of service of notice; but the failure to enter such order does notoust the court of jurisdiction and render its proceedings void.
3. ———: ———: ———. A petition was filed by a widow for the assignment of dower, such widow being also the guardian of the minor children of the deceased. Notice of the application for the assignment of dower was accepted by her, and she returned such notice with a statement thereon made by her under oath that she had served the same upon the minor children by reading and explaining the same to them, etc. This notice was held sufficient by the probate judge, and dower thereupon assigned to the widow. *Held*, That as the statute provides that notice in such case shall be given "in such manner as the judge of probate shall direct," in the absence of fraud or collusion, it was not subject to collateral attack. In other words, while the

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court disapproved of that mode of giving notice, it was not necessarily void.

4. ———: ASSIGNMENT. The acceptance by the probate judge of the assignment of dower as set off by commissioners, and recording the same, is, under section nine, chapter twenty-three, Compiled Statutes, equivalent to a confirmation of the assignment.
5. ———: ———. Where a widow after dower has been assigned, and she is in possession, conveys her interest to another, the assignee will take her dower interest in the estate.

ERROR to the district court for Dixon county. Tried below before POWERS, J.

Wigton & Whitham, and *B. B. Wood*, for plaintiff in error, cited: *Wells on Jurisdiction of Courts*, sections 36, 70, 82, (p. 71,) and 271; *King v. Merritt*, 34 N.W. Rep. 696; *Mickle v. Hicks*, 19 Kas. 582; *Taylor v. Brobst*, 4 G. Greene, (Ia.,) 534; *People v. Huber*, 20 Cal. 81; *Atkins v. Atkins*, 9 Neb. 202; *Jackson v. McLean*, 1 S. E. Rep. 785; *Hawes on Parties to Actions*, section 58; 2 *Bates's Pleadings, Parties, and Forms*, 981; *Freeman's Void Judicial Sales*, section 17; *Dickison v. Dickison*, 16 N. E. Rep. 862; *Wade on the Law of Notice*, section 1296; *Noyes v. Barber*, 4 N. H. 409; *Freeman on Judgments*, section 125; *Galbraith v. Fleming*, 27 N.W. Rep. 581.

W. E. Gantt, and *Barnes Bros.*, for defendants in error, cited: *Boltz v. Stoltz*, 41 O. St. 540; *Pope v. Mead*, 99 N. Y. 201; *Probate Law and Practice*, (Herrick and Doxsee,) 372; *Shawan v. Loffer*, 24 Iowa, 218, 226, 227; *Kline v. Moulton*, 11 Mich. 370; *Miller v. Hoberg*, 22 Minn. 249; *Russell v. Erwin's Adm'r*, 41 Ala. 292; *Golding v. Golding's Adm'r*. 24 Id. 122.

MAXWELL, J.

This is an action of ejectment brought by the plaintiffs against the defendants to recover possession of certain real

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estate. On the trial of the cause in the court below, judgment was rendered in favor of the defendants, and the action dismissed.

The plaintiffs are the children of Edward Serry deceased, and the defendants claim the possession of the real estate in controversy under an assignment of dower in lands owned by Edward Serry at the time of his death, which were assigned as dower to the mother of the plaintiffs, and by her afterwards assigned to the defendants. The plaintiffs claim that the assignment of dower was void, and that therefore the defendants have no rights in the premises. The proceedings to assign dower are as follows, beginning with the petition:

"To the Honorable J. W. Porter, judge of probate in and for said county, the petition of Charity Serry respectfully represents: That your petitioner on or about the twelfth day of February, A. D. 1856, intermarried with Edward Serry, who afterward, on or about the nineteenth day of April, A. D. 1871, departed this life, leaving your petitioner his widow, and Jonathan J. Serry, Edward E. Serry, Sarah E. Serry, Charity I. Serry, Maria D. Serry, Charles O. Serry, and William H. Serry, his children and only heirs at law; that the said Edward Serry died seized in fee simple of the following-described real estate, lying and being in the county and state aforesaid, to wit: N. E. of S. W. $\frac{1}{4}$, and lots one and two in section eleven, and N. $\frac{1}{4}$ of S. W. and S. E. of S. W. and S. W. of S. W., of section six, except three acres sold to S. Biggerstaff from S. E. of S. W. of section six, all said land being in township thirty of range six, the north $\frac{1}{2}$ of N. W. $\frac{1}{4}$ section twenty-nine and N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and east $\frac{1}{2}$ of W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section thirty, all in township thirty-one of range six.

"That your petitioner, by virtue of her said marriage, upon the death of the said Edward Serry, became and was entitled to dower in the lands above described, which said

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dower has never been assigned nor set off to your petitioner, and she has never received any compensation or equivalent therefor, nor for any part thereof. Your petitioner therefore prays the aid of this honorable court in the premises, and that the writ of summons may issue out of and under the seal of this court, commanding the said Jonathan J. Serry, Edward E. Serry, Sarah E. Serry, Charity I. Serry, Maria D. Serry, Charles O. Serry, and William H. Serry, defendants hereto, to personally appear before this court on the first day of the next term thereof for decedent cases, to be holden at my office in Ponca, in the county and state aforesaid, on the second Monday of September, A. D. 1873, and there full, true, direct, and perfect, answers make to all and singular the matters herein stated, and to stand to and abide by the order of this honorable court in the premises, and that upon the hearing hereof, a decree may be made by this honorable court that your petitioner recover dower in the premises above described, and that such dower may be assigned and set off to her in the manner and according to the providing of the statute in such cases made and provided, and that your petitioners may have such other, further, and different relief, as the nature of the case requires, and is agreeable to equity and good conscience. And your petitioner will ever pray."

This petition was filed August 27, 1873, and was duly verified. The probate judge thereupon issued the following notice:

STATE OF NEBRASKA, COUNTY OF DIXON: ss.

The people of the State of Nebraska, to Jonathan J. Serry, Edward E. Serry, Sarah E. Serry, Charity I. Serry, Maria D. Serry, Charles O. Serry, William H. Serry, and Charity Serry, guardian of said minor children: You and each of you to be and appear before me at my office, in Ponca, September 8, 1873, to hear the application of Charity Serry, widow of Edward Serry, late of Dixon

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county, deceased, praying that her dower in the said estate of said land may be set off, and there and then to oppose the setting apart of such dower should you so elect.

Witness my hand and seal this, September
[SEAL.] 2, A. D. 1873. J. W. PORTER,
Probate Judge.

The return of service on this notice is as follows:

"I accept due and personal service of the within, this 2d day of September, A. D. 1873. CHARITY SERRY,
"Guardian of the minor children of Edward Serry."

STATE OF NEBRASKA, COUNTY OF DIXON: ss.

"I, Charity Serry, being duly sworn, depose and say that I served the within on each of the persons named within by reading the same to the older children, and explaining the matter to the younger, and in their presence and hearing, on the 2d day of September, A. D. 1873.

"CHARITY SERRY."

On the hearing, the probate judge made the following order:

STATE OF NEBRASKA, COUNTY OF DIXON: ss.

Estate of Edward Serry, deceased, in probate court, September 22, 1873. The people of the state of Nebraska to William Bandt, Alexander Curry, and J. B. Barnes, commissioners appointed to assign dower to Charity Serry, widow of said Edward Serry, Greeting: This is to authorize you jointly to allot and set off to Mrs. Charity Serry, widow of the late Edward Serry, deceased, her dower out of the following lands and tenements out of the estate of Edward Serry, late of Dixon county, state of Nebraska, to wit: N. E. of S. W. $\frac{1}{4}$, and lots 1 and 2 in section 11, and north $\frac{1}{2}$ of the S. W. and S. E. of S. W. and S. W. of S. W. of section 6, excepting three acres sold to S. Biggerstaff from S. E. of S. W. of section 6, all of said land being situated in town 30 of range 6; the north $\frac{1}{2}$ of N. W.

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$\frac{1}{2}$, section 29, and N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and east $\frac{1}{2}$ of west $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section No. 30, all in township 31, of range 6; each of you first having taken the oath hereunto annexed.

Witness, J. W. Porter, probate judge of said county and state, at his office in Ponca, this 27th day of August, A. D. 1873, and the probate seal of said office hereunto affixed. J. W. PORTER, *Probate Judge*.

[SEAL.]

The commissioners so appointed took the oath required by law, and after examination made the following assignment of dower and report: "In the matter of the estate of Edward Serry, deceased, we, the undersigned commissioners appointed by the Hon. J. W. Porter, probate judge of Dixon county, to assign, allot, and set off, to Mrs. Charity Serry, her dower in the estate of her late husband, Edward Serry, deceased, respectfully report to your honor as follows:

"That by virtue of the annexed from the probate court of the said county, [we] having been first duly sworn as required by law, have, from the premises described, allotted and set off to Mrs. Charity Serry, the following lands and tenements as her dower in the said estate, viz.:

"The west $\frac{1}{2}$ S. W. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 6, township 30, range 6 east, and the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and east $\frac{1}{2}$ of west $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 30, township 31, range 6 east.

"Certified by us this 22d day of September, A. D. 1873.

"J. B. BARNES.

"WILLIAM BANDT.

"ALEXANDER CURRY."

There is also the following entry in the record of the probate court of Dixon county:

"And now on the 8th day of September, A. D. 1873, the probate court is in session. And now at this time comes Charity Serry, with her counsel, Alexander Hughes, and

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all the heirs of said estate, to wit, Jonathan J. Serry in person, and the other minor heirs, to wit, Edward E. Serry, Sarah E. Serry, Charity I. Serry, Maria D. Serry, Charles O. Serry, and William H. Serry, who appeared by their guardian, (their mother,) to wit, Charity Serry, in answer to the summons issued by the court September 2, 1873, and the summons having been returned served, the case is called, and the said Charity Serry giving her approved bond for the estate of Edward Serry, and also her bond as guardian of the minor heirs of the estate of Edward Serry, deceased, the petition is heard asking that commissioners be appointed to set off the dower of the said widow, Charity Serry. And it being shown to this court that the property of the said Edward Serry, deceased, has never been appraised, the court appoints Wm. Bandt and Alexander Curry to appraise the property, and a commission to do so is issued; and there being none to dissent to said petition, (to wit, pray that commissioners be appointed to set off the dower,) and the court, considering the matter, finds that and believes that according to the Revised Statutes in such cases made and provided, that the widow is entitled to dower, though the last will of the said Edward Serry, deceased, makes no provision for dower; and therefore the court does order that the dower be set off to the said Charity Serry, and hereby appoints Wm. Bandt, Alexander Curry, and William McDonald, as commissioners to set off the same, and that they report on the 22d day of September, A. D. 1873; and there being no other business before the court, court adjourned to September 22d, 1873, and this, the case of the estate of Edward Serry, is continued.

J. W. PORTER, *Probate Judge.*"

"And now on this 22d day of September, court being open, come Charity Serry, the widow of Edward Serry, deceased, and her attorney, Alexander Hughes, and file the inventory of the estate of said deceased. And now also come the commissioners chosen to appraise the property

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and file their report, being Wm. Bandt and Alexander Curry. And now come the commissioners, to wit, Wm. Bandt, Alexander Curry, and J. B. Barnes, (appointed by the court in the place of McDonald, who is absent.) And for the record of the reports of Charity Serry, administratrix, go see inventory, page 5. And for report of appraisers, see record, page 52. And for report of commissioners to set off dower, see record book, pages 53 and 54. And now the reports having been filed and accepted, court adjourned. J. W. PORTER, *Probate Judge.*"

The testimony shows that at the time of the death of their father, the plaintiffs were all under the age of fifteen years, the youngest being about two years of age. The appraised value of the personal estate is shown to have been less than \$500. There were a number of debts against the estate and real property belonging to the estate seems to have been sold to pay such debts.

The petition for assignment of dower was filed before the payment of the debts, and dower was assigned before such debts were paid. The dower assigned seems to have been the homestead which the widow and her children (the plaintiffs) were occupying when the petition to assign dower was filed. The widow was appointed guardian for her minor children, and so far as the record discloses, was faithful in discharging the trust. The estate evidently was not very large, but she seems to have fed and clothed the plaintiffs; and there is no claim that she defrauded them in any manner whatever. If, therefore, the plaintiffs are entitled to recover, it is upon the sole ground that the proceedings assigning dower are void.

The principal case relied upon by the plaintiffs to sustain their position, is *King v. Merritt*, 34 N.W. Rep. 689, where the court held in effect that the record failed to show that a petition for the assignment of dower had been filed, or that notice of such application had been given. In that case the record failed to show that the widow ever occupied or pos-

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sessed any portion of the premises under the claim of dower or any other claim. It will be seen, therefore, that the case cited has no application to that under consideration. The plaintiffs assert that the petition in this case fails to state facts sufficient to give the county court jurisdiction, because it fails to allege that her right to dower is "not disputed by the heirs or devisees." We do not think the failure to allege that fact is fatal to the jurisdiction of the county court. Such allegation is proper in a petition, but is not jurisdictional. If any person interested in the real estate as heir or devisee disputes the right of dower, he may allege such facts in his answer and establish the same by proof. In *Guthman v. Guthman*, 18 Neb. 98, this court held that in order to oust the county court of jurisdiction, the right of a petitioner for dower must be disputed by presenting an issue of fact which, if established by proof, would defeat her claim of dower. This, we think, is a correct statement of the law, and will be adhered to.

2. It is claimed that the probate judge should have made an order directing the manner of service of the notice.

It is sufficient to say that while the entry of such order is proper, the failure to enter the same is not fatal to the jurisdiction of the court. The second objection, therefore, is unavailing. The third objection is that the notice was never served on the plaintiffs in a manner authorized by law. Section 8 of chapter 23, Compiled Statutes, provides: "When a widow is entitled to dower in the lands of which her husband died seized, and her right to dower is not disputed by the heirs or devisees, or any person claiming under them or either of them, it may be assigned to her in whatever counties the lands may lie, by the judge of probate for the county in which the estate of the husband is settled, upon the application of the widow, or any other person interested in the lands; notice of which application shall be given to such heirs, devisees, or other persons, in such manner as the judge of probate shall direct. For the pur-

pose of assigning such dower, the judge of probate shall issue his warrant to three discreet and disinterested persons, authorizing and requiring them to set off the dower by metes and bounds, when it can be done without injury to the whole estate." It will be observed that the mode of giving notice is to be such as is directed by the county judge. Being disinterested, the law presumes that he will guard and care for the rights of the heirs and devisees of the estate. He is therefore given a discretion as to the manner of service of notice, and unless there has been such a violation of duty on his part as to oust the court of jurisdiction, his acts in the premises will not be declared void. The general rule is that a party cannot serve a notice in an action to which he is a party, as there is danger of collusion and fraud. The cases cited by the plaintiffs, however, appear to be under statutes or rules prescribing the form of service, and where the court had no discretion in the premises, and they do not seem to be applicable to this case. We do not approve of the mode of service in this case, however, and in a direct proceeding to contest the judgment, it would be held insufficient; but it is not subject to collateral attack.

The fourth objection therefore is overruled.

The fifth objection is that there is no order of confirmation of the report of the commissioners. Section 9, chapter 23, of the Compiled Statutes, provides that: "The commissioners shall be sworn before a judge or justice of the peace, to the faithful discharge of their duties, and shall, as soon as may be, set off the dower according to the command of such warrant, and make return of their doings, with an account of their charges and expenses, in writing, to the probate court; and the same being accepted and recorded, and an attested copy thereof filed in the office of the register of deeds of the county where the lands are situated, the dower shall remain fixed and certain, unless such confirmation be set aside or reversed on appeal; and one-half

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the costs of such proceedings shall be paid by the widow, and one-half by the adverse party." It will be observed that the words "accepted" and "recorded" in the above section, are used in the sense of confirmed. That is, if the assignment of dower by the commissioners is satisfactory to the judge, then he shall accept and record the same. This is the mode pointed out in the statute for his approval and confirmation of the report. It is not claimed that the report of the commissioners and assignment of dower were not properly recorded.

The fifth objection, therefore, is not well taken.

The statute in force in 1873 declared that: "The widow of every deceased person shall be entitled to dower, or the use, during her natural life, of one-third part of all the lands whereof her husband was seized, of all estate of inheritance at any time during the marriage, unless she is lawfully barred thereof."

The land in controversy was owned in fee by the father of the plaintiffs at the time of his decease. Their mother, therefore, so far as appears, was entitled to dower in such lands. There is no claim that she had been lawfully barred of such dower, or that her claims were not valid and subsisting, aside from the fact that the mode of assigning the same is claimed to be irregular and void. Even if this were so, the proper action would be to have dower assigned to their mother, and not to divest her of all claim to the use of said estate.

About the year 1881 the widow married one Mungar, and afterwards sold and conveyed her dower rights in the premises to the defendants. It is claimed that no right passed to these defendants until dower had been lawfully assigned. This is based upon the theory that the proceedings assigning dower are void. This, as we have seen, is not the case. At common law, a right of dower before assignment was a mere *chose* in action and therefore not assignable. This fact has led to some confusion in the

cases; and even in some of the states where the statute authorizes the bringing of an action in the name of an assignee of a *chose* in action, the courts have placed a narrow construction upon the language, so as to exclude the assignee in proceedings for the admeasurement of dower. No good reason, so far as we are aware, has been stated for such exclusion and no such restriction should be placed on the right of the widow to assign, or the assignee to take, her interest in the property.

Upon the whole case it is apparent that the judgment is right, and it is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

26	364
30	279
26	364
34	248
26	364
53	652
53	659
55	139

THE CHICAGO, KANSAS & NEBRASKA RAILWAY CO.,
PLAINTIFF IN ERROR, v. GEORGE HAZELS, DEFEND-
ANT IN ERROR.

[FILED APRIL 17, 1889.]

1. **Railroads: DAMAGES FOR DEPRECIATION IN VALUE OF PROPERTY.** Where town lots abut upon a street, along which a railroad is constructed so near as to cause an embankment in the street upon either side of the lot, so as to deprive the lot owner of the free use of the streets adjacent to and abutting on the lot, the lot being thereby depreciated in value to the damage of the owner, he may recover his damages from the railroad company, even though no part of the lot be taken, and no part of the street in front thereof be occupied by the railroad.
2. —: **CONSTITUTIONAL LAW.** "The words, 'or damage,' in section 21, article 1, of the Constitution, include all damages arising from the exercise of the right of eminent domain which causes a diminution in the value of private property." (*City of Omaha v. Kramer*, 25 Neb. 489.)

C. K. & N. R. R. Co. v. Hazels.

3. ———: ———. For the purpose of arriving at the diminution of the value of real estate damaged by the construction of a railroad, in estimating the value of the property after the construction of such road, it is proper to take into consideration all elements of damage caused by such construction, which tend to diminish the value of the property.
4. ———: TRIAL: EVIDENCE. In an action for damages resulting to private property from the construction of a railroad near such property, the defendant answered that the plaintiff had been paid for all damages sustained by reason of the construction of the railroad through the county where the property was situated, and upon a trial, during the taking of the testimony of the defendant's right of way agent, the defendant offered in evidence a voucher and receipt for the money paid, which was for the right of way through other property, the witness testifying that at the time of the execution of the receipt, no claim had been made for the damages involved in the suit then on trial, and therefore the damages were not included in the voucher and receipt. The plaintiff in rebuttal testified substantially to the same thing, and defendant, after plaintiff's evidence was closed, recalled its witness for the purpose of proving that when the plaintiff signed the receipt, he knew the purport thereof, which, upon objection, was excluded. *Held*, No error.

APPEAL from the district court of Pawnee county.
Heard below before APPELGET, J.

Stephen S. Brown, and *Humphrey & Lindsay*, for appellant, cited: *Pa. R. Co. v. Lippincott*, 30 Am. & Eng. R. R. Cases, 399; *Hammersmith, etc., Co. v. Brand*, L. R. 4 H. L. 171; *Republican Valley R. R. Co. v. Linn*, 15 Neb. 234; *Rorer on Railroads*, p. 33, and authorities cited; *Gottschalk v. C. B. & Q. R. R. Co.*, 14 Neb. 550, 560; *Hatch v. Vt. Cent. R. R. Co.*, 25 Vt. 49-64; *Pittsburg & Lake Erie R. R. Co. v. Jones*, 111 Pa. St. 204; *Regina v. The Metropolitan Board of Works*, 3 B. & S. 710; *Chesmore v. Richards*, 7 H. L. Ch. 349; *Ricket v. The Metropolitan Ry. Co.*, L. R. 2 H. L. 175; *Metropolitan Board of Public Works v. McCarthy*, 7 Id. 243; *Tisloe v. Graeter*, 1 Blackf. 353; *Kellogg v. Richards*, 14 Wend. 116; *Stone v. Vance*, 6 Hammond, (Ohio,) 246.

A. H. Babcock, and *J. K. Goudy*, for appellee, cited: *Republican Valley R. R. Co. v. Fellers*, 16 Neb. 169; *Cogswell v. N. Y. N. H. & H. R. R. Co.*, 27 Am. & Eng. R. R. Cases, 376; *Rigney v. City of Chicago*, 102 Ill. 64; *Gottschalk v. C. B. & Q. R. R. Co.*, 14 Neb. 550; *B. & M. R. R. Co. v. Reinhackle*, 15 Id. 279; *O. & R. V. R. R. Co. v. Rogers*, 16 Id. 117.

REESE, CH. J.

This action was instituted in the district court of Pawnee county, by defendant in error, and against plaintiff in error, to recover damages alleged to have been sustained by defendant in error to the north half of block thirty-five, in that part of Pawnee City known as North Pawnee City, by the construction of plaintiff's railroad along the north side of Third street, which is abutting on and north of defendant's property.

The trial resulted in a verdict and judgment in favor of defendant in error. Plaintiff in error seeks review by proceedings in error.

It appears from the evidence that the railroad was constructed on and along the south half of blocks twelve, twenty-nine, thirty, and thirty-one, the right of way over which had been purchased by plaintiff in error. The south half of block thirty lies immediately north of and across Third street from the property of defendant in error. On this half block is located plaintiff's depot. Practically the whole of the half blocks referred to are occupied by main and sidetracks of plaintiff's road. The tracks are laid upon a fill which varies in height from the natural surface of the ground, to about nine feet between the east side of block thirty and the west side of block twelve. The line of road and tracks cross Sheridan street, which is immediately to the west of plaintiff's property, which is on the south side of Third street, and between blocks twenty-nine and thirty,

which are on the north side of said Third street, and across Sherman street, which is immediately east of plaintiff's property, and between blocks thirty and thirty-one. The distance from the north line of Third street to the road-bed where plaintiff's road crosses Sheridan and Sherman streets is very slight—not more than a few feet. Immediately to the west of plaintiff's property, but on the north side of Third street, the fill extends into Third street. At the crossing of Third and Lincoln streets, which is three blocks east from defendant's property, plaintiff's road turns to the south, and crosses Third street upon a fill. At the crossing of Grant street, which is one block east from defendant's property, there is a cut of perhaps about fifteen feet in depth, over which is constructed a bridge along Grant street which extends into Third street, the approaches to which are graded to a height of perhaps nine or ten feet, and which extend across Third street, thus substantially closing that street one block east from plaintiff's property. Sherman street, adjoining defendant's property to the east, and Sheridan street upon the west, are practically closed by the grade and tracks crossing them immediately upon the north side of Third street. Defendant's outlet from his property is substantially limited to the south by way of Sherman and Sheridan streets, upon his east and west to the west by way of Third street, which, as we have seen, is partly occupied by plaintiff's road-bed. By this it will be seen that no part of Third street immediately north of defendant's property is occupied by plaintiff's road; that the line of road is constructed along the south half of the blocks named, upon the plaintiff's own property, obtained by it by purchase and not by condemnation, except as to the crossing of Rose street between blocks ten and eleven, Walnut street between eleven and twelve, Chestnut street between twelve and twenty-nine, Sheridan street between twenty-nine and thirty, Sherman street between thirty and thirty-one, Grant street between thirty-one and thirty-two,

and Seminary street between thirty-two and block four of Hollingshead's addition.

Under these conditions it is insisted by plaintiff in error, that defendant in error cannot recover damages, the contention being that "The defendant railroad company is not liable for any injury to the premises in question, produced by the lawful and proper construction and operation of its railroad on its own land on the north side of Third street."

Upon this point counsel for plaintiff in error have presented a very able and elaborate brief, which was supplemented by a logical argument, in which substantially, if not quite, all of the authorities, both in England and this country, were carefully considered. We have examined the authorities cited, and trust we will be excused from reviewing them, as, in our opinion, the whole question presented has been virtually disposed of by our own decisions under the provision of our Constitution, which is, that "The property of no person shall be taken or damaged for public use, without just compensation therefor." This provision of the Constitution has been considered with more or less care in *Gottschalk v. R. R. Co.*, 14 Neb. 550; *Railroad Company v. Reinhackle*, 15 Id. 279; *Railroad v. Rogers*, 16 Id. 117; *Railroad v. Fellers*, 16 Id. 169; *City of Omaha v. Kramer*, 25 Id. 489, and other cases which we need not cite.

Much stress is placed upon the fact that plaintiff purchased the parts of blocks along the north side of Third street over which its line of road runs instead of obtaining the same by the exercise of the right of eminent domain. We cannot conceive that this can make any difference. It could not purchase the streets across which its line runs, and its occupancy thereof cannot be so based. The exercise of the right of eminent domain is limited to cases where a purchase cannot be made, or where the owner of the real estate refuses to grant the right of way through or over his premises. (Section 97, chapter 16, Compiled Statutes; *Railroad Co. v. Gerrard*, 17 Neb. 587.

The right to occupy public streets is based upon a similar provision of the statutes. (Section 83, chapter 16, Compiled Statutes.)

Railroad corporations have the right, therefore, to take and use real estate for right-of-way purposes with or without the consent of the owner thereof. They also have the right to occupy roads, streets, alleys, or public grounds of any kind, by the consent of the municipal or other corporation, or public officers or authorities, or in failing to obtain such consent, by the right of eminent domain. Under this right and under the restrictions contained in section 8 of article 11 of the Constitution, plaintiff in error by lawful authority not only occupies the portions of the blocks referred to, but its crossing of Third, Lincoln, Seminary, Grant, Sherman, Sheridan, Chestnut, Walnut, and Rose streets.

It seems to be the contention of plaintiff in error that by the occupation of the lots and parts of blocks he has purchased, it is placed upon the same footing as a private owner of property, and therefore has the right to make use of its own property as it may see fit, so long as it does not create thereon a public nuisance, and, therefore, if an injury was suffered, it is *damnum absque injuria*. To this we cannot agree. We cannot consent to base defendant's right to recover upon the simple methods adopted by plaintiff in procuring its right of way. Had it been anything else than a railroad company, the owner of any single lot along its track could have declined to sell his lot and thereby prevented its construction, but owing to the fact that plaintiff was a railroad corporation, this right on the part of the lot owner did not exist. Can it be said, then, that because the lot owners consented to sell their lots, plaintiff could purchase and thus defeat the right of adjoining property owners to maintain their action for damages? Such, to our minds, would be a novel conclusion.

So far as this inquiry is concerned, it must be conceded that the property of plaintiff has been damaged by the oc-

cupation for public use of the streets and adjacent lots. That is, its value, to a greater or less extent, has been destroyed. This loss must fall upon the owner unless by the clause of the Constitution referred to, he is given an action against the corporation causing it, for his damage.

In *Gottschalk v. Railroad Co.*, *supra*, it was decided that where a lot abuts upon an alley upon which a railroad is built, if the owner of the lot sustains damages in excess of that shared by the public generally, he may recover if he is deprived of a public right which he enjoyed in connection with his property. In the opinion it is said: "It is not necessary, to entitle a party to recover, that there should be a direct physical injury to his property, if he has sustained damages in respect to the property itself whereby its value has been permanently impaired or diminished. This is but justice."

To that extent we must consider the law of this state settled. In *B. & M. Railroad Company v. Reinhackle*, 15 Neb. 279, it was held that the authorities of a city could not authorize a railroad company to permanently appropriate and obstruct a portion of the street without compensating all the property owners abutting thereon, if especially injured thereby. In that case it is said that although the fee of streets is in the public, yet it is held in trust for public use. "The municipal corporation cannot sell or permanently obstruct the streets without compensation to the owners of property especially injured thereby. The trust, like any other, must be exercised in good faith. It was created to give permanency to streets and apply them wholly to the use of the public. But in addition to the public benefit, every lot owner whose lots abut on a street has a special interest therein, distinct from the public at large. Unless the owner can have free and unobstructed access to his property, it will be of little value." See also *City of Omaha v. Kramer*, 25 Neb. 489.

In *Railroad Company v. Fellers*, *ante*, it was held that

where real estate was damaged by the construction of the railroad, but no part thereof was appropriated to the use of such road, an action might be maintained against the railroad company for such damages. In that case, while no part of Fellers's property was taken, yet it was surrounded or inclosed within what is commonly termed a "Y," being depreciated in value by the construction of the road across and over adjacent property and streets.

It has been uniformly held by this court that the provision of the Constitution giving compensation to the owners of property damaged for public use, shall be given a reasonable and practical construction; and that where property is rendered of less value by the construction of a public improvement of the kind mentioned, the owner shall have "just compensation therefor." The amount or extent of damage is a question of fact for the jury.

In the amended answer of plaintiff in error, it is averred that "On the 9th day of September, 1886, the Chicago, Kansas & Nebraska Railroad Company paid to the plaintiff the sum of \$100, and the plaintiff accepted the same in full payment of all damages sustained by him by reason of the lawful construction of the said railroad through the county of Pawnee, in the state of Nebraska, and thereupon, by an instrument in writing signed by him, released the Chicago, Kansas & Nebraska Railroad Company from any claim or demand of plaintiff on account of such damages, which are the same alleged damages described and sued for in plaintiff's amended petition."

On the trial, plaintiff in error introduced and caused to be read to the jury a voucher and receipt signed by defendant in error, which is as follows:

372 SUPREME COURT OF NEBRASKA,

C. K. & N. R. R. Co. v. Hazels.

"DEFENDANT'S EXHIBIT 'A.'"

CHICAGO, KANSAS & NEBRASKA RAILROAD CO.		Station.
Book _____ 250	To DAVID & GEORGE HAZELS.	Dr.
_____ 1		
Charge to	1886 1.	Dollars. Cents.
	Sept. 1.	
	1. For a strip of land feet wide, of which the entire line of the route and line of the Chicago, Kansas & Nebraska Railroad Company, as the same is now sur- veyed, staked, and located, is the center, being feet each side of the center line of said route, over, across, and through, the following-described tract of land, as said route and line of said railroad passes through the same, to wit:	
	All of lot 11 in block 10 in Hazels's Add. to Pawnee City, Neb., Pawnee Co., Neb.... \$100 00	
	And including all damages sustained or to be sus- tained by me by reason of the construction and oper- ation of the railroad of said company in a lawful manner, through said county of Pawnee.	
Construction ac't Right of way.		
Certified: _____ 1		
Examined and correct:		
H. F. MORRIS, Auditor.		
Approved:	Dated Sept. 9th.	
M. A. Low, President.	Received of the Chicago, Kansas & Nebraska Railroad Company the sum of One Hundred Dollars, (\$100.00,) in full for the above account.	
	[Signed]	DAVID & GEORGE HAZELS."

This paper was introduced during the examination of Mr. Ewing, who was the right of way agent, and who procured its execution.

Defendant in error in rebuttal was called upon the stand and testified in substance that he gave a number of such vouchers, some of which were for lots sold the railroad

company constructing the road, others being for lots sold to said company by owners thereof who had previously purchased from him, but to whom no deeds had been made; the railroad company preferring the execution of conveyances directly from him instead of to the purchasers, and from them to the railroad company, thus avoiding the expense and trouble of one conveyance in each purchase. It was further said by the witness that he did not observe the language of the voucher as including damages sustained by the construction of the road through the county of Pawnee. After the rebuttal evidence of defendant in error had closed, plaintiff in error again called Mr. Ewing, and offered to prove by him that "Mr. Hazels signed the instrument fully advised of what was in it, and that the money paid for the lots—the amount—was fixed in view of abutting damages."

Upon objection being made, this evidence was excluded, of which plaintiff in error now complains.

This cannot be made ground for reversing the judgment for two reasons: First, the witness Ewing had been upon the stand and examined as to the execution of the instrument referred to prior to the examination of defendant's witnesses in rebuttal. By the examination of his witnesses, the testimony in the case would ordinarily be considered closed. The further introduction of evidence would be within the discretion of the trial court, and a judgment would not be reversed except for an abuse of such discretion. (Section 283 Civil Code.) Second, it is shown upon the examination of the same witness, Ewing, during the trial, that no claim for damages to block thirty-five had been made at the time of the execution of the voucher and receipt; that the same was not considered, and therefore could not have entered into consideration at the time of the execution of the paper referred to. There was no error, therefore, in excluding the offered evidence.

Defendant in error offered in evidence an ordinance of

the city of Pawnee City, conferring upon the Chicago, Kansas & Nebraska Railroad Company the right of way through and upon Second, Third, Fourth, Butler, Emery, Pawnee, Lincoln, Seminary, Grant, Sherman, Sheridan, Chestnut, Walnut, and Rose streets.

Plaintiff in error then requested the court to give to the jury the following instruction, which was refused: "The court instructs the jury that in assessing the damages in this case, they will not take into consideration any right acquired from the city of Pawnee, but only such acts as had been done by defendant, or its grantor, before the beginning of this suit."

By this instruction it was sought to take from the consideration of the jury the right conferred upon the railroad company to occupy Third street, as the road had been constructed north of the line. This instruction was rightly refused, for the reason that it was shown by the evidence upon the trial that the construction of the road-bed and fill upon which the track was laid, extended into and partially across Third street. In order to enable defendant in error to maintain his action, it was, perhaps, thought to be necessary that it be shown that the erection of the embankment in Third street was lawful; and for this purpose, if for no other, the jury had the right to consider that fact.

It seems from the evidence and record that the right-of-way was obtained by the Chicago, Kansas & Nebraska Railroad Company, but that at some time after its organization, and perhaps the construction of the road, the railroad corporation was succeeded by plaintiff in error, the Chicago, Kansas & Nebraska Railroad Company. This fact is not referred to in the petition. The answer admitted that plaintiff in error was a corporation, and alleged that the Chicago, Kansas & Nebraska Railroad Company constructed the road; but there is no allegation in any of the pleadings that plaintiff in error is the successor of the Chicago, Kansas & Nebraska Railroad Company. The cause appears

to have been tried throughout upon the theory either that the road was constructed by plaintiff in error, or that plaintiff in error and the Chicago, Kansas & Nebraska Railroad Company were in fact the same corporation; and the contention of plaintiff in error that the petition was defective in its averments, the question not having been raised before or during the trial, cannot now be considered for the first time. But in any event plaintiff in error, if the successor of the Chicago, Kansas & Nebraska Railroad Company, would be liable under the provisions of article 4, chapter 72, of the Compiled Statutes, as construed in *C. St. P. M. & O. R. R. Co. v. Lundstrom*, 16 Neb. 254.

It is averred in the petition that by the construction and operation of plaintiff's road, smoke, soot, and dust, from the engines, the ringing of bells, sounding of whistles, noise of passing and repassing trains at all hours of the day and night, together with the danger to plaintiff's buildings from sparks from the passing engines, render the property unfit for residence or business purposes. And that they were thereby damaged, etc.

Upon the argument it was contended that these are not elements of damage under the provisions of the Constitution. In *Blakely v. C. K. & N. R. R. Co.*, 25 Neb. 207, this question was presented, and it was there held that while all these elements were competent to be considered by witnesses in arriving at the depreciation of the value of the property, yet they were not necessarily elements of damage upon which an estimate might be separately based by a jury. No one will contend but that property so situated would be less valuable and less desirable than if otherwise located, and in arriving at the correct measure of damages, according to the method of proof as stated in that case, they were all proper to be considered. (See also *Columbus, etc., Ry. Co. v. Gardner*, (Ohio,) 13 N. E. Rep. 69.) The real question involved is as to the depreciation of the market value of the property, and it

is competent to prove any fact by which such depreciation may be established.

We find no error, and the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

ANN BROWN, PLAINTIFF IN ERROR, V. MRS. H. C. SMITH,
DEFENDANT IN ERROR.

[FILED APRIL 17, 1889.]

1. **Husband and Wife.** In an action for ladies' furnishing goods, where it is sought to charge the separate estate of the wife, upon the ground that the credit had been given to her and not to her husband, the plaintiff testified that she had copied the account from the books of original entry and had then given such books to her children for scrap books, and that they had mutilated or destroyed the same. The contest being whether the credit was given to the husband or wife, *held*, that the failure to preserve and produce the books of original entry, under the circumstances, was ground of suspicion.
2. **Practice.** Ordinarily, where the clear weight of testimony is against the verdict, so that it is apparent that it is wrong, the judgment will be reversed.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Pound & Burr, for plaintiff in error, cited: *Spaun v. Mercer*, 8 Neb. 357; *Davis v. First National Bank of Cheyenne*, 5 Id. 242.

B. F. Johnson, for defendant in error, cited: *Davis v. First National Bank of Cheyenne*, 5 Neb. 242; *Webb v. Hoselton*, 4 Id. 308; *Tillman v. Shackleton*, 15 Mich. 446;

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Campbell v. White, 22 Id. 178; *Miller v. Brown*, 47 Mo. 504; *Whitesides v. Cannon*, 23 Id. 457.

MAXWELL, J.

This action was brought on an account for ladies' furnishing goods. On the trial of the cause the jury returned a verdict in favor of the defendant in error for \$417.30, and a motion for a new trial having been overruled, judgment was entered on the verdict.

The petition contains four allegations:

First—That from 1883 to 1886 plaintiff was engaged in mercantile business in Lincoln.

Second—That during these years she sold to defendant goods on credit on "representations of defendant that the goods purchased were for her special use and benefit;" that defendant owned real estate in her own name, and that out of her separate estate she would pay for the goods.

Third—That during these years, at various times, defendant paid different sums on said accounts, at all times acknowledging the amount to be just, and that she would pay it; and that on the faith of these representations "credit was given to defendant."

Fourth—That \$417.30 is due, and plaintiff prays judgment for \$417.30 and costs.

The answer contains two defenses:

First—A general denial.

Second—Alleges that defendant is, and was at the time the debt was contracted, a married woman, living with her husband; that plaintiff well knew the same; that the goods were purchased by defendant's husband for his family; that any and all payments were made by defendant's husband; that at no time did defendant carry on any trade or business on her sole and separate account.

The contention of the plaintiff in error is that the goods in question were sold to the children of George Brown, her

husband, she being their mother, and that such goods were sold on the credit of and charged to George Brown, her husband. The testimony shows that a large part of the goods were purchased by one Anna Brown, a daughter of George Brown and the plaintiff in error, for the use of such daughter and other daughters of said parties. But one garment—a dress, so far as appears—was for the use of the plaintiff in error. The principal question in the case is, To whom was the credit given? The defendant in error testifies that the credit was given to the plaintiff in error; that she made inquiry as to the financial ability of Mr. Brown, and found that it was not good; that Mrs. Brown possessed property, and that the latter promised to pay her when she sold such property; that but for such promise on the part of the plaintiff in error, she would not have sold the goods in question to her children.

Unfortunately for the defendant in error, she failed to produce the books of original entry.

She testified that the account sued on was copied from such books; that thereupon she gave the books to her children "for scrap books," and that they had been mutilated or destroyed. This explanation is not very satisfactory; and it is somewhat remarkable that in suing on an account which is liable to be contested, the books upon which the original charges were made should willfully have been turned over to her children as things of no value. The failure to preserve and produce such books, under the circumstances in this case, must be regarded with suspicion. If such books upon being produced showed that the original charges were against the plaintiff in error, they would go far to establish the account as a charge against her. On the other hand, if they should show that the charges were against George Brown, the books would be fatal to the claim of the defendant in error. Hence the importance of producing such books in evidence. The plaintiff in error testifies that she never purchased any of the goods in question

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of the defendant in error, nor were such goods purchased on her credit. Anna Brown, the daughter, who seems to have purchased all or nearly all of the goods, testifies that they were purchased on the credit of and charged to her father, George Brown; and other witnesses testify to facts tending to corroborate the testimony of the two witnesses last named. In addition to this, it is clearly shown that the bill was presented to George Brown at various times, and payment thereof demanded from him; and in such bill the charges seem to have been against George Brown, and he made some small payments on the account. The clear weight of testimony therefore sustains the defense that the goods were sold to and charged to George Brown. The plaintiff in error, in her cross-examination, while denying that she purchased the goods, or that they were purchased on her credit, admits that she had stated to some one who presented the bill, that she would pay the same when she sold her property. Whether such a promise is binding upon her or not, not being in writing, it is unnecessary to consider, as the action is not founded upon a new promise, but upon the original liability of the plaintiff in error.

The judgment of the district court is against the clear weight of the evidence, and is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other Judges concur.

GARDINER HAINES ET AL., APPELLANTS, V. JAMES
FLINN ET AL., APPELLEES.

[FILED APRIL 7, 1889.]

Mortgage foreclosure: RES ADJUDICATA. In an action to foreclose a mortgage, a junior mortgagee was made defendant, who answered the petition setting up certain judgment liens, and also a mortgage executed to him by the owner of the real estate, and praying for a decree foreclosing said liens. A decree was rendered in favor of the plaintiff for the amount due upon his mortgage, and in favor of the junior mortgagee for the amount of his judgments, but allowing nothing on the junior mortgage. No appeal was taken, but afterwards such junior mortgagee brought an action to foreclose such junior mortgage. *Held*, That as the matters were directly put in issue by the pleadings in a former action, the decree in that case was a bar to the second action.

APPEAL from the district court of Johnson county.
Heard below before BROADY, J.

L. C. Chapman, for appellant, cited: *Miles v. Caldwell*, 2 Wallace, 35; *U. S. Manfg. Co. v. Stevenson*, 17 N.W. Rep. 934; *Herman on Estoppel*, sec. 467; *M' Lure v. Wheeler*, 6 Rich Eq. (S. C.) 343; *Dexter v. Harris*, 2 Mason, 531; *Stewart v. Johnson*, 30 O. St. 24; *Walsh v. Rutgers Co.*, 13 Abb. Pr. (N. Y.) 33; *McKernan v. Neff*, 43 Ind. 503.

A. M. Appelget, for appellee, cited: *Brigham v. McDowell*, 19 Neb. 412; *Nelson v. Bevins*, Id. 715; *Wells*, Res Adjudicata, secs. 229, 235, 248, 249; *Hapgood v. Ellis*, 11 Neb. 131, 142.

MAXWELL, J.

This action was brought to foreclose a mortgage on real estate, the petition being in the ordinary form. On the trial of the cause, the court found for the defendant and dismissed the action.

The defendants McCrosky, Wright & Leach answer the petition as follows: "Now come said defendants, McCrosky, Wright & Leach, and Charles Leach, trustee of defendants McCrosky, Wright & Leach, and for their answer to the petition of said plaintiffs, say that they admit the execution of the notes and mortgage by defendant James Flinn to those plaintiffs, and allege that they do not know, nor have they any means of knowing, the amount due thereon from defendant Flinn to plaintiff, and therefore deny that there is due on said notes the sum of \$356¹⁵/₁₀₀ and interest, or any other sum or sums, and call for proof.

"Defendants further answering admit that said mortgage was filed in the clerk's office of Johnson county, Nebraska, at the time in said petition named. Defendants McCrosky, Wright & Leach, further answering, allege that on or about the third day of February, 1886, these defendants as plaintiffs filed their petition in the district court in and for Johnson county and state of Nebraska against James Flinn and Elizabeth Flinn, William B. Goldsmith, Haines Bros. & Co., and Louis Grosjean, as defendants, and praying for the foreclosure of a certain mortgage, made, executed, and delivered, by James Flinn and Elizabeth Flinn, his wife, two of the defendants herein, to McCrosky, Wright & Leach, plaintiffs in said cause and defendants herein, to secure the payment of the sum of one hundred and fifty dollars, which said mortgage bore date on the ninth day of January, 1885, and was filed for record in the clerk's office of Johnson county and state of Nebraska on the ninth day of January, 1885, and conveyed to these defendants the following-described premises, situated in Johnson county and state of Nebraska, to wit: The southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter of section nine, (9,) town four (4) north, of range eleven east.

"Said petition, among other allegations, alleged: Said Haines Bros. & Co. are made defendants herein because

said James Flinn executed to them a mortgage on said premises dated March 7, 1885, and filed for record in said Johnson county on March 27, 1885, and recorded in mortgage record O, page 476; said mortgage was conditioned to pay the sum of \$286.15; and that said mortgage of said Haines Bros. & Co. was subsequent to the mortgage of the plaintiffs therein and subject thereto.

"That afterwards, to wit, on or about the sixteenth day of February, 1886, Haines Bros. & Co., the plaintiffs in this action, appeared and answered the petition of the plaintiffs in said cause, McCrosky, Wright & Leach, and admitted, to wit:

"That James Flinn executed to them a mortgage on the premises described in plaintiffs' mortgage and petition dated March 7, 1885, and that the same mortgage was filed for record in said Johnson county on March 27, A. D. 1885, and recorded in mortgage record O, at page 476.

"That said mortgage was conditioned to pay the sum of two hundred and eighty-six and fifteen one-hundredths dollars, and further the said defendants therein, Haines Bros. & Co., answering, alleged:

"That their mortgage as set up in plaintiffs' petition, and as herein admitted to be true, is not and will not become due until March 9, A. D. 1886; further answering, 'Deny each and every other allegation in this plaintiff's petition contained not herein admitted to be true.' And the said defendants answering, in conclusion, say: 'Therefore these defendants pray that the said mortgage of these defendants, Haines Bros. & Co., may be foreclosed.'

"That McCrosky, Wright & Leach, James Flinn, Elizabeth Flinn, and William B. Goldsmith, may be foreclosed of all right of redemption or other interest in said premises, and for such other and further relief as equity and good conscience may require.

"That afterwards, at the April, 1886, term of the district court in and for Johnson county and state of Nebraska, to-

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wit, on the thirteenth day of April, 1886, said cause coming on to be heard on the issues joined, the court found: 'Due plaintiff from defendant James Flinn, on note, \$215, and same is a second lien on the premises; and that there is due defendant Haines Bros. & Co., on judgments, \$317¹⁶/₁₀₀, which is a third lien on the premises; and that there is due Louis Grosjean \$20, which is the fourth lien; and that the claim of defendant William B. Goldsmith is the first lien and not yet due, and shall be subject to it. Decree of foreclosure and order of sale.'

"In accordance with such finding so made, said decree of foreclosure was entered, and on the eleventh day of May, 1886, order of sale was issued directed to the sheriff of said county, who after advertising said sale, sold the premises described on the twenty-eighth day of June, 1886, to McCrosky, Wright & Leach, which said sale was by the Hon. J. H. Broady, judge of said district court, on the seventeenth day of August, 1886, at chambers, confirmed, and deed ordered to be made to Charles Leach, the other answering defendant herein, and one of the firm of McCrosky, Wright & Leach, in trust for said firm of McCrosky, Wright & Leach. And these answering defendants further allege that each and all of the matters and things in plaintiffs' petition averred were by the said court at the April, 1886, term thereof, in the cause then therein pending between McCrosky, Wright & Leach as plaintiffs, and Haines Bros. & Co. and the other defendants herein, defendants, were matters in issue before the said court in said cause; and that the said things and matters in issue were by the said court fully considered and determined, and these answering defendants were by said court found to have a lien prior to the mortgage lien of these plaintiffs, and decree was rendered upon said finding; that in pursuance of such decree, the said premises were sold to satisfy the decree in favor of these answering defendants, and subject to the mortgage lien of defendant Goldsmith; that no appeal has been taken or proceedings in error had in said original suit.

"As a second matter of defense these defendants aver that the mortgage sued on and described in plaintiffs' petition was executed upon land occupied at the time of the execution by the said James Flinn and Elizabeth Flinn, his wife, as a homestead, and which said mortgage was signed by the said James Flinn only, and defendants allege that said mortgage is not a lien upon the premises therein described.

"Defendants further answering, deny that the said James Flinn is indebted in the sum of \$....., or any other sum, to the said plaintiff.

"Defendants further deny each and every allegation in plaintiffs' petition contained, except such as are herein specifically admitted.

"Wherefore these defendants pray that the court may decree that the matters and things in plaintiff's petition averred were in said first named cause fully determined and adjudicated, and that these defendants' title to the said premises be decreed to be paramount and superior to the mortgage of said plaintiffs."

Flinn in his answer alleges that the land in controversy was the homestead of himself and wife, and that the mortgage to the plaintiff was not signed by his wife. The reply consists of certain denials. The answer of Haines Bros., in the nature of a cross-petition, in the former action, is set out in the record, from which it appears that in the former action they had filed a cross-bill and asked to have their mortgage foreclosed. The decree, however, fails to show that any sum was allowed Haines Bros. on the foreclosure of said mortgage, but they were allowed certain judgment-liens claimed by them. No appeal was taken, and they seem to have been satisfied with the decree. It is impossible for us to hold such decree to be void. The court may have found that the mortgage had been satisfied, or that it was void, or given without consideration. The mortgage was then due, and for aught that appears it should have

been foreclosed unless some of the defenses to the same were considered sufficient to defeat it. The evidence in that case is not before us, and the presumptions are that the decree was right. The matter involved in the plaintiffs' petition, therefore, having been set up in a former action by cross-petition, and a judgment rendered thereon, is *res adjudicata*.

In *Packet Co. v. Sickles*, 5 Wallace, 592, the supreme court of the United States say: "As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear by the record of the prior suit that the particular controversy sought to be concluded was necessarily tried and determined; that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact. But even where it appears from the intrinsic evidence that the matter was properly within the issue controverted in the present suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

In our view, the matter involved in this case was properly before the court in the former action, and its judgment thereon will be conclusive.

The rule is that "Where a court has jurisdiction, it has a right to decide every question which arises in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. In no collateral way can the parties question the correct-

ness of a judgment which has been rendered between them in a court having jurisdiction of them and of the subject-matter. The only way for them to investigate such a judgment is by a rehearing of that cause, either by writ of error or some other legal and direct mode. For, to the extent to which the judgment goes, their rights have been considered and decided, and they have submitted to that decision either from the force of law after a final hearing by a court of last resort, or from a disinclination to pursue the matter further when other courses of procedure for rehearings were open before them and might have been had if they had so elected. Upon this point the authorities are numerous and decisive." *Hollister v. Abbott*, 11 Foster, (N. H.,) 448; Wells, *Res Adjudicata* and *Stare Decisis*, 5.

This we regard as a correct statement of the law. The former decree, therefore, is conclusive, and this action is thereby barred. An examination of the record shows that the sale was confirmed at chambers, in a county other than that in which the land is situated. Whether under our statute there is authority to confirm the sale in this manner is not raised by either pleadings or proof.

There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

OLE ANDERSON, PLAINTIFF IN ERROR, V. STATE OF NE-
BRASKA, DEFENDANT IN ERROR.

[FILED MARCH 13, 1889.]

1. **Criminal Law: SENTENCE.** Under the provisions of the act approved March 31, 1887, it is made the duty of the supreme court in all criminal cases pending therein on error, where the sentence is excessive, to reduce the same and render such sentence against the person convicted, as is warranted by the evidence.
2. ———: **MURDER: EVIDENCE: SENTENCE.** To sustain a conviction of murder in the first degree it is necessary to show premeditation and deliberation on the part of the person convicted. Therefore, where the proof shows that the person convicted, killed another purposely, there being no proof of deliberation and premeditation, a verdict of murder in the first degree cannot be sustained, and it is the duty of the court either to reverse the judgment and remand the cause for a new trial, or render such a judgment reducing the sentence as is justified by the evidence, viz., imprisonment in the penitentiary.
3. ———: ———: ———. At common law, the intentional killing of a human being, without explanatory circumstances, is murder; but under section 4 of the Criminal Code, such killing is murder in the second degree. The first and second degrees of murder as provided in sections 3 and 4 of the Criminal Code, are intended to indicate the degree of the atrocity of the crime; but a verdict in either degree is for murder; and if the degree found is higher than is warranted by the evidence, the person convicted may as a right insist upon a modification of the sentence to conform to the proof, and it is the duty of the court to reduce the sentence and impose such sentence as is warranted by the evidence.
4. ———: ———: **CONSTRUCTION OF STATUTE.** The act referred to is remedial in its nature, and is intended to apply to all cases of a criminal character pending in the supreme court on error.
5. ———: ———: ———. The act of reducing a sentence under the statute of 1887, and rendering such a one as is warranted by the evidence, is in no sense a commutation nor the exercise of clemency. That is an act of grace to be exercised or not by the executive alone, in his discretion. But the reduction of a sentence and the imposition of a new one based upon the testimony, is a right

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which every one convicted of a crime and upon whom a sentence higher than is warranted by the testimony has been imposed, may demand under the act referred to.

MOTION to modify sentence of plaintiff in error.

J. L. Caldwell, and *A. L. Warrick*, for plaintiff in error.

William Leese, Attorney General, for the state.

MAXWELL, J.

The judgment of the court below was affirmed in this case, and reported in 25 Neb. 550; but the statement was made at the time to the attorneys for the plaintiff in error, and to the attorney general, that as the proof failed to show premeditation, the sentence would be modified under the act of 1887 to imprisonment in the penitentiary for life. The plaintiff in error thereupon filed a personal petition for a modification of the sentence as prescribed by the statute. That act is as follows, including the title:

“An act to provide for the supreme court to reduce the sentence of persons convicted of crime, when pending in the supreme court on error, and to allow said court to render such judgment against such persons as may be warranted by the evidence.

“*Be it enacted by the Legislature of the State of Nebraska:*

“SECTION 1—That in all criminal cases that now are or may hereafter be pending in the supreme court on error, the said court may reduce the sentence rendered by the district court against the accused, when, in their opinion, the sentence is excessive, and *it shall be the duty of said supreme court* to render such sentence against the accused as in their opinion may be warranted by the evidence.

“SEC. 3—Whereas, an emergency exists: this act shall be in force and take effect from and after its passage.

“Approved March 31, 1887, Laws 1887, chapter 110, Comp. Stat. 1887, Criminal Code, section 509a.”

This act was prepared by the attorney general, or at his request, and passed by the legislature, and was intended to apply to all crimes and offenses. The emergency clause was added so that the act would apply to a case then pending in the supreme court, where the plaintiff in error had been convicted of murder in the first degree without any proof of premeditation or deliberation. That case, however, was reversed upon other grounds, and is not now before the court.

Blackstone, in defining murder, has adopted the definition given by Coke: "When a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied." (4 Blacks. Com. 195.)

Our statute defines murder as follows:

"If any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate, any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another; or, if any person, by willful and corrupt perjury, or by subornation of the same, shall purposely procure the conviction and execution of any innocent person; every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death." (Crim. Code, section 3.) "If any person shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree; and on conviction thereof, shall be imprisoned in the penitentiary not less than ten years, or during life, in the discretion of the court." (Section 4.)

In *Milton v. State*, 6 Neb. 136, the plaintiff in error was convicted of murder in the first degree without proof of deliberation and premeditation on the part of the prisoner, and the judgment was reversed for that cause alone. That case is cited with approval in *Fisk v. State*, 9 Neb. 66;

Schlenker v. State, Id. 303; *Simmerman v. State*, 14 Id. 569; *Ballard v. State*, 19 Id. 617. To convict of murder in the first degree, therefore, it is necessary to prove that there was deliberation and premeditation of the party charged with the crime before he committed the same.

An examination of the evidence in this case wholly fails to show premeditation and deliberation before the plaintiff in error committed the crime. Unless there is power in the court, therefore, under the statute, to reduce the punishment and render such a judgment as is justified by the evidence, it will be necessary to reverse the case, and remand it for a new trial.

Under our statute any person who purposely and maliciously, but without deliberation and premeditation, kills another, is guilty of murder in the second degree, and on a trial for murder, where the prosecution establishes against the prisoner an intentional homicide, and nothing explanatory is shown, malice is presumed, and at common law the crime would be murder, but, under our statute, murder in the second degree. (*Previtt v. People*, 5 Neb. 384; *Bohanan v. State*, 15 Id. 214.) If, therefore, the proof in a particular case should establish the fact that the accused committed the act purposely, and there being no explanatory circumstances, it would be the duty of the jury to find him guilty of murder, but in the second degree. If, however, the proof went a step farther and showed that before committing the act, he had premeditated and deliberated thereon, this would show a greater degree of guilt, and it would be the duty of the jury to find him guilty of murder in the first degree. The jury, however, must be governed by the evidence, and a finding made without evidence upon a particular point, if material, cannot be sustained. Under the statute the findings of the jury are not conclusive upon this court as to the degree of guilt, if the evidence fails to sustain the degree found by the jury. Therefore, if one is found guilty of murder in the first degree, but the proof

shows him to be guilty of murder in the second degree only, the court to that extent may disregard the finding of the jury, and render such a judgment as should have been rendered in the first instance, and save the county where the trial was had, the delay, expense, and annoyance, of a new trial. It being murder, but in the second degree, where the homicide is shown to have been purposely committed, and there being no further proof, the jury should have rendered a verdict in conformity to the evidence.

The finding as to the higher degree merely applies to the atrocity of the crime; a verdict in either degree is for murder. But it may be said that the jury having found that the crime was premeditated, and that therefore the punishment should be death, that the court cannot review this finding and render a new judgment based upon the evidence. If this were so the statute would be of no avail, as the court before the passage of the act had power to correct errors prejudicial to the accused. The act of 1887 is not restrictive in its terms, and no exception can be made without injecting words therein. Clearly it applies to all crimes, including all grades of murder. If, therefore, the jury find a party guilty of a grade of murder higher than is warranted by the evidence, the court, while sustaining the conviction of murder, may reduce the grade to conform to the proof. The whole theory of our criminal law is that punishment shall be based upon the degree of guilt proved, and that no severer penalty shall be imposed than is warranted by the evidence. Hence this court is given power to review the evidence, and is required to see that the punishment is not in excess of that justified thereby. Suppose, as in the case at bar, there is no proof of premeditation, yet the jury, not understanding the law, or carried away, it may be, by passion or prejudice, find a verdict of murder in the first degree: may the accused not insist as a right, upon a modification of the sentence to conform to the evidence? We think he may. In such case while the

evidence shows he is a criminal, yet his criminality, under the charge made against him, does not reach the higher degree found by the jury. The death penalty is to be imposed only in the cases mentioned in section 3 of the Criminal Code, and if the evidence fails to establish a case under that section, then the conviction to that extent is unjust, and punishment, if inflicted thereunder, would be an arbitrary exercise of power, but without justice. Courts act upon evidence, and are governed by it in determining the rights of parties; and this principle applies with tenfold force where it is sought to impose a punishment of a much higher nature upon a party than the evidence shows should be inflicted. The legislature, therefore, to guard against reversals for want of evidence on a material point in particular cases, and also to prevent the infliction of a penalty upon a party which the evidence does not warrant, has empowered this court to review the evidence in any case pending therein on error, and reduce the sentence and render such a one as is justified by the evidence; and this act applies to murder in the first degree, the grade of which may be reduced to a lower degree to conform to the proof. The statute is a remedial one, and like all statutes of that class, is to be liberally construed in favor of justice. The act of reducing the sentence and rendering a new one in accordance with the evidence, is in no sense a commutation of the former sentence. That can be granted only by the executive of the state, and is granted or refused as a matter of discretion. The reduction of a sentence, however, is a matter of right upon which the prisoner may insist when that imposed is in excess of what the evidence will justify. In other words, the statute makes it the duty of this court, when the proper proceedings are had, to review the evidence, and prevent the imposition of punishment which the evidence will not warrant. In the case under consideration, as the proof fails to show premeditation and deliberation of the plaintiff in error before he committed the

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crime, but does show that he purposely and maliciously committed the same, he is not guilty of murder in the first degree and should not suffer death. It is our duty, therefore, to reduce the sentence, in accordance with the statute, to imprisonment in the penitentiary during his life; and the sentence is so modified.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

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32	470

STATE OF NEBRASKA, EX REL. CHARLES NICHOLS, v.
ALBERT L. FIELD.

[FILED MARCH 13, 1889.]

Counties: DIVISION: ELECTION OF OFFICERS. Where a new county is created by the division of a larger one, the county commissioners elected at an election ordered by the governor in such new county for the election of officers, merely continue in office until the next general election for such officers, and until their successors are elected and qualified.

ORIGINAL application for mandamus.

F. M. Devore, and *W. M. Iodence*, for relator.

James H. Danskin, for respondent.

MAXWELL, J.

The relator alleges in his information "That at the general election of 1886, the county of Box Butte was erected out of territory belonging prior thereto to Dawes county; * * * that the governor issued his proclamation ordering an election of county officers for such new county upon

March 8, 1887, as provided by law, at which election all the county officers of said new county of Box Butte were duly elected. That at said election, A. S. Reed, L. C. DeCondress, and James Barry, were elected county commissioners for such new county, and that said board of county commissioners, in the month of June, 1887, being regularly in session, divided said county into three commissioners' districts, as required by law, said districts being numbered respectively one, two, and three; that at the general election held in November, 1887, the said A. S. Reed and Sam'l W. McClutchen were qualified electors of said county residing in the third commissioner's district, and were candidates for the office of county commissioner for said district, and that the said McClutchen received a majority of all the votes cast for said office at said election, and received from the county clerk of said county a certificate of his election to the office of county commissioner for said commissioner's district, duly signed by said clerk and attested by the seal of said county, and in due time executed his good and sufficient official bond and took the oath of office required by law, and presented said official bond to the county judge of said county, and demanded said county judge to file and approve said bond; but the county judge refused to approve the official bond of said McClutchen, alleging as the reason therefor that at the election ordered by the governor and held on the 8th of March, 1887, said A. S. Reed had been elected commissioner for said third commissioner's district for the term of three years, and that there was no vacancy in said office; and by reason of the refusal of said county judge to approve the official bond of said McClutchen, the said A. S. Reed continued to hold said office; that at the general election held, after due and legal notice being given according to law, on the sixth day of November, 1888, this relator was a qualified elector of said county and residing in the third commissioner's district of said Box Butte county, and legally qualified to hold the office

of county commissioner therein, and at said general election held (after due and legal notice being given according to law) on the sixth day of November, 1888, was duly elected county commissioner for the third commissioner's district of said county, there being no opposing candidate to fill a vacancy then existing in the office of county commissioner of the third commissioner's district of said county, caused by the failure of Samuel W. McClutchen to qualify, on account of said county judge refusing to file and approve his official bond as aforesaid; that the relator, upon his being elected as aforesaid, received from the county clerk of said county a certificate of his election to the office of county commissioner for the third commissioner's district of Box Butte county, attested by the seal of said county and signed by said clerk, and in due time executed a good and sufficient official bond for the performance of the duties of the office of county commissioner for said county, and took the oath of office required by law, and presented said official bond to the respondent herein, who then was and still is the county judge of said county, and is required by virtue of his said office to file and approve the official bonds of county commissioners of said county, and demanded him, the said respondent, to approve and file his said official bond; but the said respondent, who is county judge as aforesaid, refused and still refuses to approve and file said official bond of this relator, and alleges that the said A. S. Reed was elected to the office of county commissioner for the term of three years at the election ordered by the governor and held on the eighth day of March, 1887, and that there is no vacancy in the third commissioner's district of Box Butte county, as the reason for such refusal."

He prays for a writ of mandamus to compel the defendant to approve such bond.

The answer of the respondent in effect admits the allegations of the petition to be true.

Sec. 7, chap. 10, Compiled Statutes, provides that: "The official bonds of the county commissioners or supervisors shall be approved by the county judge."

McClutchen seems to have abandoned all claim to the office in question. For the purposes of this action, we must assume that as between McClutchen and the relator, the latter has the superior right. This assumption, however, in case of a contest between them, would in no way affect their respective rights.

Sec. 11, art. I, chap. 18, Compiled Statutes, provides that: "If it shall appear that a majority of all the votes cast at such election in each of the counties interested, is in favor of the erection of such new county, the county clerk of each of said counties shall certify the same to the secretary of state, stating in such certificate the name, territorial contents, and boundaries, of such new county; whereupon the secretary of state shall notify the governor of the result of such election, whose duty it shall be to order an election of county officers for such new county, at such time as he shall designate, and he may, when necessary, fix the place of holding election, notice of which shall be given in such manner as the governor shall direct. At such election the qualified voters of said new county shall elect all county officers for said county, except as hereinafter excepted, who shall be commissioned and qualified in the same manner as such officers are in other counties in this state, and who shall continue in office *until the next general election for such officers*, and until their successors are elected and qualified, and who shall have all the jurisdiction and perform all the duties which are or may be conferred upon said officers in other counties of this state.

Section 12 is as follows: "All the justices of the peace, constables, and other township or precinct officers, who were previously elected and qualified in the county or counties from which such new county has been formed, whose term of office shall not have expired, at the time of said election,

and whose residence shall be embraced within the limits of said new county, shall continue in office until their terms of office shall expire, and until their successors shall be elected and qualified."

In counties duly organized the statute provides that "The board of county commissioners, in all counties having not more than 70,000 inhabitants, shall consist of three persons, and in counties having more than 70,000 inhabitants, shall consist of five persons. They shall have the qualifications of electors and shall be elected in their respective districts at the annual general election." (Sec. 53, ch. 18, Comp. Stat.)

"Sec. 54. Each county having not more than 70,000 inhabitants, shall be divided into three districts, numbered respectively one, two, and three; and in counties having more than 70,000 inhabitants, shall be divided into five districts, numbered respectively one, two, three, four, and five, and shall consist of two or more voting precincts, comprising compact and contiguous territory, and embracing, as near as may be possible, an equal division of the population of the county, and not subject to alteration oftener than once in three years, and one commissioner shall be elected from each of said districts by the qualified electors of the county, as hereinbefore provided. The district lines shall not be changed at any session of the board unless all of the commissioners are present at such session: *Provided*, That in counties of 70,000 inhabitants or more, it shall be the duty of the commissioners of such county, on or before September 1, 1887, to divide said county into five commissioners' districts, as provided for in this bill: *Provided further*, That the three commissioners of such county whose term of office will expire respectively on the first Thursday after the first Tuesday in January, in the year 1888; on the first Thursday after the first Tuesday in January, in the year 1889; and the first Thursday after the first Tuesday in January, in the year 1890; shall continue to represent the districts in which they shall reside after

the redistricting of such county, until the expiration of the terms for which they were elected: And *Provided further*, That at the general election in the year 1887, one commissioner shall be elected for each of the two remaining districts. Of the two persons elected in such districts, the person receiving the highest number of votes shall hold his office for the term of three years, and the person receiving the next highest number of votes shall hold his office for the term of two years, and each commissioner elected thereafter in pursuance of the provisions of this section, shall hold his office for three years and until his successor is elected and qualified.

“Sec. 55. At the first election held to choose the board of commissioners under this act in any county, the person having the highest number of votes shall continue in office for three years; the next highest two years; and the next highest one year; but if any two or more persons have the same number of votes, their term of office shall be determined by the board of canvassers, and each commissioner elected at the first general election, as herein provided, shall hold his office for three, two, and one years, as the case may be, and until his successor is elected and qualified, and each commissioner elected thereafter, in pursuance of the foregoing section, shall hold his office for three years, and until his successor is elected and qualified.”

Two of these sections were amended in 1887, the amendments taking effect after March 8 of that year; but these amendments do not affect the case. It will be seen that it is the duty of the commissioners to divide the county into (in this case) three commissioners' districts, such districts to consist of two or more voting precincts “comprising compact and contiguous territory and embracing as near as may be possible an equal division of the population of the county.”

Sec. 101, ch. 26, Compiled Statutes, declares that an office shall become vacant when the person holding the office

State v. Field.

shall cease to be a resident of the district in which his duties are to be exercised.

In *State v. Skirving*, 19 Neb. 497, it was held that a county commissioner must continue to reside in the district in and for which he was elected, and that his removal from the district, even where he continues to reside in the same county, vacates the office. This, we think, is a correct statement of the law, and we adhere to it.

The commissioners elected at the first election are to divide the county into commissioners' districts, each district to comprise at least two voting precincts, of compact and contiguous territory, and embracing as near as possible one-third of the population of the county. At the first election all of the commissioners may be elected from one locality.

In many instances this would undoubtedly be the case. The law contemplates the creation of commissioners' districts and then the election of one commissioner from each district. This could not be accomplished in the temporary organization of a county, and it is evident from a comparison of the various provisions of the statute that commissioners elected at the first election for officers of a new county merely hold their offices until the next general election and until their successors are elected and qualified. As between the relator and Mr. Reed, therefore, the relator is entitled to the office, and it is the duty of the respondent to approve his bond. Probably it will be unnecessary to issue a writ, as the respondent no doubt will approve the bond without further action. If not, a writ will issue as prayed.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

WILLIAM FISCHER, PLAINTIFF IN ERROR, V. ALONZO J. COONS, DEFENDANT IN ERROR.

[FILED MAY 16, 1889.]

1. **Pleading.** Objections to a pleading when attacked by a motion to require it to be made more definite and certain, should specifically point out the alleged defects; and a motion to require "the plaintiff to make the allegations in his petition more specific and certain," without further particularity is too general to assign error upon, after an adverse ruling.
2. **Instructions** examined and found not prejudicially erroneous.

ERROR to the district court for Hayes county. Tried below before COCHRAN, J.

J. Byron Jennings, for plaintiff in error.

No appearance for defendant in error.

REESE, CH. J.

This case is upon error to the district court of Hayes county. In that court defendant in error, who was the plaintiff, filed his petition, which was in the following language:

"ALONZO J. COONS, <i>Plaintiff</i> ,	}
v.	
"WILLIAM FISCHER, <i>Defendant</i> ."	

"PETITION.

"The plaintiff complains of the defendant, for that on the twelfth day of August, 1887, stock running at large and owned by said defendant and branded S, thirty head of which the plaintiff had in his possession, and have since been driven away from the premises of this plaintiff, did trespass upon plaintiff's cultivated land and did damage

the property of said plaintiff to the amount of two hundred and thirty dollars.

"The said plaintiff claims judgment for the sum of five dollars for care and feeding said thirty head of stock for the space of seven days.

"Plaintiff asks judgment for the sum of \$235 and a lien upon said stock for said sum."

Plaintiff in error filed a motion, of which the following is a copy, as shown by the transcript, omitting the formal parts:

"The defendant moves the court to require plaintiff to make the allegations in his petition more specific and certain."

This motion was overruled, which ruling is now assigned for error. In this decision there was no error. The motion was too general. The objections to the petition should have been specifically pointed out. (Maxwell's Pl. & Pr. 167.)

After the motion above referred to had been overruled, plaintiff in error filed his answer, which consisted of a general denial and an allegation of a tender of the sum of \$60, when a jury trial was had, which resulted in a verdict in favor of defendant in error for the sum of \$62.50, when plaintiff in error interposed a motion for a new trial, in which he assigned the following grounds:

"*First.* The verdict is not sustained by sufficient evidence.

"*Second.* Because the verdict is contrary to law, and the court erred in giving instructions numbers one and five on its own motion.

"*Third.* Because of excessive damage appearing to have been given under the influence of passion and prejudice.

"*Fourth.* Errors of law occurring on the trial and duly excepted to by defendant."

No bill of exceptions accompanies the record on this submission, and therefore none of the errors assigned can be examined, except the second, and that only to the extent of an investigation of the instructions referred to, the first of which is as follows:

"The plaintiff, Alonzo J. Coons, alleges in his petition that on or about August 12, 1887, the stock of the defendant, William Fischer, to the number of about 150 head of cattle, did trespass upon cultivated land of plaintiff, Alonzo J. Coons, and destroy $9\frac{1}{2}$ acres of growing corn on plaintiff's land, to wit, on the S.W. $\frac{1}{4}$ of section 30, T. 7 N., R. 30 west, and that the value of the corn crop so damaged and destroyed was the sum of \$235."

While the instruction is open to the criticism made by plaintiff in error that it does not correctly state the allegations of the petition, and details with more particularity than is found in it the elements of defendant's alleged damages, yet we are unable to discover how plaintiff in error could have been prejudiced by it. The answer by the plea of tender substantially admitted the trespass and damage, and in reality the only question was as to the amount defendant in error was entitled to recover. It must be conceded that the issues in the case were rather inartistically joined; but we are satisfied that no injury could result from the instruction.

The fifth instruction is as follows:

"You are further instructed that you are the exclusive judges of the credibility of the witnesses, and of the weight to be attached to the testimony of each and all of them; that you should take into consideration the whole of the evidence and all the facts and circumstances on the trial, giving to the several parts of the evidence such weight as they are entitled to, and take into consideration their interest in the event of the suit, if any such interest is proved; the reasonableness of the testimony given by them, and all

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the evidence and circumstances tending to corroborate or contradict such witnesses, if any such is proved."

The objection to this instruction is to that part which directs the jury to take into consideration "all the facts and circumstances on the trial, giving to the several parts of the evidence" such weight as they were entitled to in the opinion of the jury. While it is true that the jury should consider the evidence alone, and not extraneous facts or circumstances which may have fallen under their observation during the trial, yet we think the proper interpretation of the instruction will bring it within the legal rule. The "facts and circumstances on the trial" are limited by the instruction to "the several parts of the evidence" so that the jury could not be misled by the instruction when considered as a whole.

We find no reversible error in the record, and the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

C. J. ELLIOTT ET AL., APPELLANTS, V. HENRY ATKINS
ET AL., APPELLEES.

[FILED MAY 16, 1889.]

1. **Attorney: LIEN.** An attorney has a lien for a general balance of compensation on any papers of his client which may come into his possession in the course of his professional employment; upon money in his hands belonging to his client, and in the hands of an adverse party, in an action or proceeding in which the attorney was employed, *from the time of giving notice of the lien to that party.*
2. ———. In order to render a defendant liable to a lien for the services of the plaintiff's attorney, it is indispensable that

26	403
44	508
26	408
460	700
26	408
62	427a

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a claim of lien be filed with the papers or given to such adverse party. Notice of a contract between the plaintiff and his client where no lien is claimed, will not bind the defendant or render him liable for the services of plaintiff's attorney.

APPEAL from the district court of Lancaster county.
Heard below before CHAPMAN, J.

Lamb, Ricketts & Wilson, and *J. R. Webster*, for appellants.

O. P. Mason, D. G. Courtney, and *J. B. Archibald*, for appellees.

MAXWELL, J.

In 1884 Luke Lavender brought an action in the district court of Lancaster county to redeem certain real estate from judicial sales. It is alleged in his petition in substance that in the year 1873 Lavender possessed a large quantity of land in and adjoining the city of Lincoln, a description of which is set out in the petition; that Lavender became indebted to many persons, and borrowed money and executed certain mortgages on portions of said real estate; and a large number of judgments were recovered against him and became liens upon his real estate; and that sales under executions issued on said judgments thereafter took place, and the land was sold to the defendants, and said sales were thereafter confirmed and deeds made to the purchasers. No fraud seems to be claimed in obtaining the judgments; but it is alleged that the defendants fraudulently prevented competition at the sales, and hence were able to purchase the property for less than its value, and for less than they otherwise would have been able to do.

A trial was had on the 5th day of November, 1885, and a decree rendered giving a right of redemption as to part of the lands in controversy, the decree being: "The court finds the facts upon the issues joined in favor of the plaintiff."

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iff as to those lands described as the southwest quarter of the northwest quarter, of the northeast quarter of section twenty-five, township ten north, of range six east, in Lancaster county, Nebraska, and that the plaintiff is entitled to redeem the same, and be restored to the possession thereof, upon the payment within six months next ensuing, of the sum of two hundred and thirty-four dollars, with interest thereon at the rate of seven per cent per annum from March 22, 1879, until the same is paid into court for said defendants. It is therefore ordered and adjudged and decreed that upon the payment by the plaintiff of said sum into court for the defendants within the time aforesaid, the sheriff's sale of March 22, 1879, and deed to said lands, to wit, the southwest quarter of the northwest quarter, of the northeast quarter of section twenty-five, township ten north, of range six east, in Lancaster county, Nebraska, be set aside, annulled, and held for naught, and the title to said lands be quieted in the plaintiff as against the claim or title that said defendants or either of them, and all persons holding or claiming to hold under them or either of them, may have or claim to have under and by virtue of said sale and deed; and that the defendants and each of them convey to plaintiff the right, title, and interest, by them or either of them held or claimed in and to said lands by virtue of said sale and deed; and that plaintiff have possession of said lands and execution therefor; and if in default of the plaintiff making such payment within the time aforesaid, it is ordered and adjudged and decreed that the title in and to said lands, to wit, the southwest quarter ($\frac{1}{4}$) of the northwest quarter, of the northeast quarter of section twenty-five, township ten, range six east, in Lancaster county, Nebraska, be quieted in the defendant, Martha I. Courtney, to which defendants except. This decree, however, is not to affect the judgment or execution, lien or liens, which said defendants or either of them may have or hold on said lands."

The plaintiff excepts thereto, and the court further finds "as to the rest and residue of said lands in the petition described, the issues joined in favor of the defendants and against the plaintiff, and it is further ordered and decreed that the title in and to the rest and residue of said lands in the petition described, be quieted in the defendants; plaintiff excepts thereto."

The court further adjudges and decrees that each party, plaintiffs and defendants, pay one-half of the costs of the action, taxed at \$80.50. "Thereupon the parties each severally pray an appeal from so much of this decree as is adverse to them; a supersedeas bond of plaintiff is fixed in the sum of \$1,000, a bond on part of defendants is fixed in the sum of \$500, the same severally to be filed within twenty days."

Soon after the rendition of the above judgment, Lavender and the defendants compromised the matters of difference between them, and the action was dismissed. The plaintiffs, however, asserted that under a certain contract with Lavender they had rights in the property, and insisted on prosecuting the appeal. The appeal, however, was dismissed. (See *Lavender v. Atkins*, 20 Neb. 206.)

The plaintiffs now prosecute the action in their own names. On the trial of the cause in the court below, the court found in favor of the defendants, and the action was dismissed.

The contract referred to, after setting out a description of the lands involved, the titles of the several actions where sales had taken place, provides: "And, whereas, it is deemed advisable by said Lavender to have additional legal counsel and assistance in the further management in said causes; therefore it is agreed by and between the parties hereto that the said Lamb, Ricketts & Wilson are retained in the said causes, and, together with said Elliott & Stevenson, are to conduct and manage said causes and all other suits necessary to be instituted for the purpose of recovering the

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whole or any portion of said property in said district court, and any other court or courts, and prosecute the same to final judgment or decree; and upon a final determination of the matters involved in said suits, the property recovered is to be disposed of as follows: First, all judgments which may at such time be and constitute subsisting and valid liens so far as may be required or necessary to be paid, and all costs in said suit, whether advanced by said Lavender or otherwise, are to be paid. Second, after the full payment of such liens, taxes, and costs, the said L. Lavender is to convey to the said Elliott & Stevenson an equal one-third part of all the remaining property so recovered, which the said Elliott & Stevenson agree to accept in full satisfaction for all legal services rendered, or hereafter to be rendered by them in said matter; and the said Luke Lavender further agrees to convey to the said Lamb, Ricketts & Wilson an equal one-third of all the said property so recovered as aforesaid, which they, the said Lamb, Ricketts & Wilson, hereby agree to accept in full satisfaction for all legal services rendered or to be rendered by them in said matters; and if the interests of the parties hereto demand, or for any other reason the said property is converted into money, the net proceeds thereof are to be divided between the parties hereto on the same basis of one-third to each of said above-named firms; and the said Luke Lavender further agrees to give security for costs in all cases where the same may be required, and will advance and apply all the necessary costs and legitimate expenses of such litigations, which will be first repaid him out of the proceeds as above set forth."

The existence of this contract was unknown to the defendants until about the time of the dismissal of the action. Its existence was known, however, before the payment of all the consideration. The plaintiffs seek to apply the same rule against the defendants as would prevail against a purchaser of real estate with notice of an outstanding contract

for the sale of the same. In our view, however, that rule does not obtain in cases of this character. In the case at bar there was no sale nor assignment of any portion of the real estate or its proceeds. There was no absolute transfer to the plaintiffs. They were merely employed to conduct the litigation to a successful termination, when all that should be realized after paying the expenses was to be divided into three parts, of which the plaintiff in that action was to have one part, and each firm of attorneys a part.

Section 8, chapter 7, Compiled Statutes, provides that: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment, upon money in his hands belonging to his client, and in the hands of the adverse party, in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party."

In *Boyer v. Clark*, 3 Neb. 161, it was held that this right was superior to the rights of the parties in the suit or any set-off.

In *Griggs v. White*, 5 Neb. 467, the notice of the attorney's lien was filed with the papers in the case, and the lien held to be valid and binding. In the same case, however, certain other attorneys claimed a lien, but not for services rendered in that case, and the notice was held insufficient.

In *Reynolds v. Reynolds*, 10 Neb. 574, an action was brought on two promissory notes. The attorneys for the plaintiff filed an attorney's lien, of which notice was given to the defendant. Afterwards the plaintiff came into court and dismissed the case without prejudice. Her attorneys thereupon asked leave to proceed with the action to enforce their lien, and leave was granted and the action dismissed, except as to the lien. The court, by Lake, J., say: "It may not be wholly out of place for us to say that, under circumstances readily suggested, one of which, and proba-

Boston Tea Co. v. Brubaker.

bly an indispensable one, was here present—the attempted dismissal of the case by the plaintiff—we should regard the course pursued not only permissible, but eminently proper.”

The latter case was cited with approval in *Oliver v. Sheeley*, 11 Neb. 521.

An attorney, therefore, who desires to enforce a claim for his services, must file a lien to that effect; otherwise he cannot enforce a claim against the adverse party. This claim for a lien may be filed with the papers in the case, and the adverse party will be chargeable with notice of its existence. The existence of a contract between a client and his attorney, where there is no claim for a lien, would not be notice to the adverse party that he intended to assert the claim against him, as it might be presumed that such attorney intended to rely on the responsibility of his own client. In the case at bar there is no lien claimed or filed on behalf of the plaintiffs, and nothing to apprise the defendants that claims would be asserted against them.

The judgment of the court below must therefore be affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

BOSTON TEA COMPANY, PLAINTIFF IN ERROR, V
ALVAH H. BRUBAKER, DEFENDANT IN ERROR.

[FILED MAY 16, 1889.]

1. **Practice.** There is no question of law presented by the pleadings.
2. **Remittitur.** The verdict of the jury being for too great an amount in favor of the defendant in error, he is required to remit the excess as a condition to the affirmance of the judgment.

26	406
47	669

ERROR to the district court for Gage county. Tried below before BROADY, J.

Winter & Kauffman, for plaintiff in error.

A. D. McCandless, for defendant in error, cited: *W. A. Wood Mowing and Reaping Machine Co. v. Crow*, 30 N.W. Rep. 609; *Winch v. Baldwin*, 28 Id. 62; *Clanton v. Des Moines & O. S. R. Co.*, 25 Id. 277; *Walsh v. Culbertson's Estate*, 38 Id. 631; *Parsons on Contracts*, vol. 1, p. 44; *Campbell v. Sherman*, 49 Mich. 534.

COBB, J.

This was an action in the nature of assumpsit brought by the defendant in error against the plaintiff in error in the Gage county district court, for goods, wares, and merchandise, sold and delivered. The petition alleges that on the fourth day of November, 1887, plaintiff sold and shipped to said defendant, at Council Bluffs, Iowa, at the defendant's request one car load of potatoes, containing five hundred and one bushels of potatoes, at the agreed price of forty-eight cents per bushel, amounting to the sum of \$240.48; that defendant received said potatoes, paid the freight thereon, unloaded them, and put them in its cellar at Council Bluffs, Iowa, and refused to pay for them, and still refuses to pay for them; that there is now due to plaintiff from the defendant, for said potatoes, the sum of \$240.48, no part of which has been paid, etc.

Defendant made answer to said petition, alleging that on or about the first day of November, 1887, it bargained at plaintiff's request for one car load of potatoes of No. 1 extra good quality, and to be in first-class condition when delivered on track at Lanham, state of Nebraska; and that defendant agreed to purchase from the plaintiff said car load of potatoes, in quality as aforesaid and in good

condition when delivered on track at Lanham, Nebraska, at the sum of fifty cents per bushel; that in consideration of the premises the plaintiff then promised the defendant that said car load of potatoes as aforesaid would be delivered on the track at Lanham, Nebraska, at the rate of fifty cents per bushel, which was agreed to be paid by defendant for the quality and the condition of the potatoes; that relying upon said promises and statements of the said plaintiff, the defendant purchased the same for the price and upon the terms and conditions as aforesaid. But defendant says that when said car load of potatoes was delivered on the track at Lanham, and when the same reached Council Bluffs, Iowa, in about six days thereafter, the said potatoes were badly damaged, and were of inferior quality, and upon examination by defendant, the said car load of potatoes was found imperfect, and did not conform to the quality and kind of potatoes purchased from the said plaintiff, and not worth to exceed the sum of thirty cents per bushel, there being in said car load not to exceed 500 bushels; that if said goods had been perfect and had conformed to the promise and statements made in reference to said contract with said plaintiff, they would have been worth the sum of fifty cents per bushel, but defendant alleges that they were worth not to exceed the sum of thirty cents per bushel as aforesaid; that when said car load of potatoes arrived at Council Bluffs as aforesaid, the said defendant unloaded and stored the same safely for the purpose at that time of preserving the same from loss by freezing, and not for the purpose of accepting the same on the contract as aforesaid; and defendant says that at said time the weather was intensely cold, and it was unsafe to allow the said car load of potatoes to remain in said car, as it would have been great loss and damage to said plaintiff, as defendant says and believes; that as soon as defendant discovered the condition and the quality of said car load of potatoes, it notified the said plaintiff as to the facts and the condition of the said potatoes, and offered to

return the same, and was ready to do so, but defendant says that plaintiff neglected and refused to take the same back, and thereupon, about ninety days after the same had arrived at the city of Council Bluffs, and the plaintiff neglected and refused to receive the same, and after said notice was given to plaintiff by this defendant, as aforesaid, this defendant says that it then sold the said potatoes, having caused the same to be sorted, and as many of them as were marketable, to wit, about 250 bushels, were sold by defendant at retail at the highest market price which could be obtained for the same. About one-half of the remaining portion of said potatoes were sold at retail for the highest market price which could be obtained for the same, bringing in all the sum of \$156, about one-fourth of said potatoes being wholly worthless, etc.; that out of said money so received for the sale of said potatoes as aforesaid, and according to the terms of said contract as aforesaid, it paid the freight on said potatoes from Lanham, Nebraska, to Council Bluffs, Iowa, the sum of \$37.50, and for labor, storage, drayage, and care, in and about the same, the sum of \$40; with prayer that the sum of \$78.50, the amount of said money paid out by defendant as aforesaid, might be deducted from the amount of money received, to wit, the sum of \$156, the proceeds of said car load of potatoes.

The plaintiff replied to the said answer denying each and every allegation of new matter therein contained.

There was a trial to a jury, which found for the plaintiff, and assessed his damages at \$251.68.

The defendant brings the cause to this court on error. It appears from the record that before decision of the court upon the defendant's motion for a new trial, the plaintiff entered a *remittitur damnum* in the sum of sixty cents.

There is a large amount of evidence contained in the bill of exceptions, much of which is scarcely applicable to the pleadings. Indeed, there was but one question between the parties. The plaintiff alleged that he sold to the defend-

ant 501 bushels of potatoes, at forty-eight cents per bushel. Defendant alleges that it bought from the plaintiff the same number of bushels of potatoes at the rate of fifty cents per bushel; and that the potatoes were warranted by the plaintiff to be of No. 1, extra-good quality. This simply means that he warranted them to be good, sound, merchantable potatoes. Potatoes being an article of food, the sale implies such warranty, and it was not necessary to prove it. Defendant also alleged that said potatoes, when delivered and received, "were badly damaged, and were of an inferior quality." These allegations of the defendant were denied by the reply of the plaintiff.

While the difference between the parties as to the price at which the potatoes were bought and sold is rather unusual, it seems to have been overlooked by the jury, as well as the counsel; but it presents a question of no great difficulty. No question of agency is presented by the pleadings, and although it seems to have received a good deal of attention, both on the trial in the court below and in the briefs of counsel, I do not deem it of importance or as controlling the case whether the witness Bryant was the agent of either of the parties. The only question for the jury was, Were the potatoes sound and merchantable? On this question there was a sharp and irreconcilable conflict of evidence. No witness testified that the potatoes were damaged or unsound, but five witnesses on the part of the defendant testified that they were unmerchantable on account of their inferior size. On the other hand, the plaintiff and six witnesses on his behalf, testified that the potatoes were merchantable, and of good average size and good quality. It was no question of science or skill; any witness of ordinary capacity can testify as to the quality and soundness of potatoes; and the weight of their testimony was a question exclusively for the jury.

No question is raised by plaintiff in error, in the brief, upon the instructions to the jury.

But notwithstanding the remittitur entered by the plaintiff, the verdict and judgment are still for too much. The plaintiff can only recover for the potatoes at the price alleged in his petition, even if the defendant does allege in its answer that it bought them at a higher price. Five hundred and one bushels, at forty-eight cents per bushel, amount to \$240.48. Interest on that sum for seven and one-half months at seven per cent per annum, gives \$9.11, making \$249.59.

The judgment will therefore be reversed and the cause remanded for a new trial, unless the plaintiff shall, within twenty days from the date of the filing of this opinion, enter a remittitur in this court of one dollar and forty-nine cents. But in case of the entering of such remittitur within the time above stated, the judgment is affirmed.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

ABDON L. BURKE, PLAINTIFF IN ERROR, V. ARTHUR V. PERRY, CHAIRMAN BOARD OF COUNTY COMMISSIONERS, AND WILLIAM F. WAGNER AND JONAS E. CHAMBERS, DEFENDANTS IN ERROR.

[FILED MAY 16, 1889.]

1. **Elections: CONTESTING ELECTION.** A complaint filed in an election contest will be held sufficient in substance if the statute which prescribes what its contents shall be, is followed.
2. **Judgment.** The decision of a special tribunal, where it has jurisdiction of the subject-matter and parties, is conclusive, unless reversed or modified in the mode provided by law. (*State v. Nelson*, 21 Neb. 572.)
3. **Elections: CONTEST: PARTIES.** A contest of an election is an adversary proceeding, and, where the election to be contested is

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one upon the question of relocating a county seat, persons or localities having an interest adverse to the contestant, or some of them, are necessary parties to the contest, and such interest must be shown by the complaint.

APPEAL from the district court of Gosper county.
Heard below before COCHRAN, J.

Capps & McCreary, for appellants, cited: 1 Story Eq. Pl., sec. 543; *Skinner v. Stewart*, 13 Abb. Pr. (N. Y.) 442; *Laws v. Vincent*, 16 Neb. 208.

W. S. Morlan, and *Marquett, Deweese & Hall*, for appellees, cited: *Scott v. McGuire*, 15 Neb. 303; *Peck v. Weddell*, 17 Ohio St. 284; *Demarest v. Wickham*, 63 N. Y. 320.

REESE, CH. J.

This was a proceeding to contest a county-seat election in Gosper county. A complaint was filed in the district court, to which the defendants demurred, and upon the demurrer being sustained and the case dismissed, the plaintiff brings it into this court by proceedings in error, assigning as such error the decision of the district court on the demurrer. The complaint is entitled:

<p>"ABDON L. BURKE, Complainant, v. "ARTHUR V. PERRY, CHAIR- MAN BOARD OF COUNTY COMMISSIONERS, AND WIL- LIAM F. WAGNER AND JONAS E. CHAMBERS."</p>	}
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There is no allegation in the complaint that any of the defendants are the board of county commissioners of Gosper county; nor is any other reference made to them in any part of it.

The allegations of the complaint may be fairly summarized as being, that on the 2d day of October, 1888, a petition purporting to be signed by three-fifths of the voters of Gosper county, as shown by the last preceding general election, was filed with the board of county commissioners, asking them to call a special election in said county for the purpose of voting upon the question of relocating the county seat of said county; and that said board, treating the petition as legal, and complying with the requirements of the law, ordered an election for the purpose named to be held on the 30th day of the same month, which election was accordingly held; that the board had no authority nor jurisdiction to call said election, for the reason that the petition was not signed by three-fifths of the legal voters of said Gosper county; that at the election held, there was malconduct, fraud, and corruption, in two precincts in the county, to wit, Plum Creek and Robb precincts; that at Plum Creek the judges of the election knowingly permitted fraudulent and illegal votes to be cast by persons under twenty-one years of age, and by persons who were not citizens of the United States, nor of this state, and those who had not resided in the state, county, and precinct, a sufficient length of time to be entitled to vote at said election; that the voters and parties interested in the election were not permitted to see the ballot-box during the election, but that it was kept secreted and in a place where it could not be seen during the progress of the election; and that while counting the ballots, in making the returns, those who were opposed to the relocation of the county seat were, by said judges, refused admittance to the room in which the canvass was made, and did admit those who were favorable to such relocation, the judges of election at the time well knowing the interest of the persons so admitted and excluded; "that the ballots so cast at said polling place aforesaid and received by the said judges of election in said precinct, were sufficient to change the result of said election;" that the

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polls were opened and the voting commenced "long before eight o'clock in the morning of said 30th day of October, the day fixed in said notice for the holding of said election, and that sundry and divers votes were so at said time cast by sundry persons" to the complainant unknown, "the number thereof being sufficient to change the result of said election;" that there were legal votes suppressed by the judges of said election in said Plum Creek precinct, they being votes cast in favor of Homerville, but that the judges of election refused to count or canvass them, and abstracted them from the ballot-box and destroyed them. That in Robb precinct the judges of election knowingly received the votes of persons under twenty-one years of age, and votes of persons who were non-residents of the state, county, and precinct, and of those who had not resided in the precinct a sufficient length of time to entitle them to vote, and that the said fraudulent votes so cast were sufficient in number to change the result of the election in said county; that after the votes of said precinct were counted and canvassed, the clerks of election failed to sign the poll-books, and the judges of said election failed to certify to the vote and the count thereof.

It was alleged generally with reference to the election in the county, that parties favorable to the relocation of the county seat, at said election "offered and gave to electors and canvassers of said election, bribes, rewards, and money, for the purpose of procuring the relocation of the county seat * * * in their endeavors to have the same located at the village of Ellwood, in said county."

That there were illegal votes received at said election sufficient to change the result thereof.

That parties favoring the location of the county seat at Ellwood, by the use of bribery and money, procured parties to cast their votes in one precinct and then go to another precinct in said county and cast similar votes thereat;

there being sufficient bribes, and repeating votes cast, to change the result of said election.

That the reason the names and number of persons illegally voting at said election were not given, was that the judges of election in whose custody the poll-books were placed, refused to permit the complainant to inspect said poll-books, and would not allow any one opposed to the relocation at Ellwood to see or inspect them, claiming they did not know where nor in whose possession they were.

The demurrer was upon the following grounds:

"First—Said complaint does not state facts sufficient to constitute a cause of action.

"Second—Said complaint does not state facts sufficient to constitute a cause of action against these defendants or either of them.

"Third—There is a defect of parties defendant."

The questions presented by the demurrer are in reality but two. These are as to whether the complaint contained averments of facts sufficient to entitle the contestant to the relief demanded, admitting the truth of all material facts well pleaded, and as to whether defendants are the proper sole parties to the action as contestees.

Sections 81 and 82 of chapter 26 of the Compiled Statutes of 1887, provide the method by which a contest may be instituted, which is, by complaint filed in the district court (sec. 70) and which shall contain the name of the contestant, the averments that he is an elector competent to contest the name of the incumbent, the officer (or question) contested, the time of the election, the particular causes of contest, if illegal votes are received, or legal votes rejected, the names of the persons who so voted, or whose votes were rejected, if known, with the precinct, township, or ward, where they voted or offered to vote, etc. The complaint, in this state, is doubtless intended as a substitute for the notice usually required, and must be measured by substan-

tially the same rules, and in *Talkington v. Turner*, 71 Ill. 234, and *Dale v. Irwin*, 78 Id. 170, it was held that the complaint should be as specific as a bill in chancery, and that the technical averments in an information in quo warranto, or a common-law declaration, would not be required. In *State, ex rel. Ballentine, v. Penniston*, 11 Neb. 100, it was held that a notice which contained the averments required by the statute was sufficient, which were: the rights of the contestant, the office to be contested, the date at which its duties commenced, with the points of contest. It would no doubt be commendable pleading to allege in the complaint the result of the election, the number of votes cast and canvassed, and the declaration of the result; but in *Ledbetter v. Hall*, 62 Mo. 422, and *Rounds v. Smart*, 71 Me. 380, these averments were held to be unnecessary, the statute, as in this state, providing what the complaint should contain, and if followed it would be sufficient. (See also *Howard v. Shields*, 16 O.St. 184.) The names of the persons who cast illegal votes, and of the legal voters whose votes were rejected, were not given, but a sufficient reason for the failure is shown. The complaint is perhaps sufficient, when assailed by demurrer, although a motion to require it to be made more definite and certain in many respects, should and would, doubtless, have been sustained. The allegation that less than three-fifths of the voters of the county signed the petition, was of no force, since under the rule stated in *The State, ex rel. Hymer, v. Nelson*, 21 Neb. 572, the decision of the county board is conclusive, unless reversed or modified in the mode provided by law. (See also *State v. Nemaha County*, 10 Id. 32.)

Upon the other branch of the case, we think the demurrer was properly sustained. It does not appear upon the face of the petition that defendants are interested in the result of the county-seat contest in any form. A demurrer for defect of parties will lie when it appears on the face of the petition that necessary parties defendant are wanting.

(*Hardy v. Miller*, 11 Neb. 396.) It sufficiently appears by the complaint that the election contest in Gosper county is, to some extent at least, an adversary one; that is, that there are conflicting interests. If so, the interests adverse to those of contestant, should be brought in as contestees. It is contended by plaintiff in error that the county commissioners, having called the election, and having a general oversight over the interests of the county, are the proper parties defendant, as they have an official interest in all the corporate concerns of the county. To this we must answer that there is nothing in the complaint anywhere which implies, or which by any interpretation can be construed to intimate, that William J. Wagner and Jonas E. Chambers have any connection with any board of county commissioners, or that they hold any official position whatever. They are nowhere described as officers, nor is there anything which shows that they are even citizens of Gosper county. Had they demurred separately on the ground that sufficient facts as to them were not stated in the complaint, such objection would have been well taken, as there were no allegations which, by the most liberal construction, show that they have any interest, official or otherwise, in the result of the contest. Abdon L. Burke is described in the caption of the complaint as the "Chairman Board of County Commissioners." While there is no further reference to him or to his official position, we may assume that he is the chairman of the board of county commissioners of Gosper county, and (although we do not decide such to be the case) that he has an official, legal interest, in the result of the contest to the extent of desiring a fair expression of the choice of the county; yet such official interest would not dispense with the necessity of making those persons having an interest adverse to contestant, parties to the action. A contest of an election must be what its name implies—an adversary proceeding by which the matters in controversy may be settled upon issues joined. As a matter

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of law and official duty, the chairman of the county board can have no interest in *where* the county seat shall be located. Such interest, if it exist at all, could only be to have it so located as would be to the convenience and best interests of the whole county; and while he might be a proper, or even a necessary party, yet the necessity for making those—or some of them—who are *actually* interested adversely to the contestant, would not be obviated. It is true, as contended, that under the provisions of the Code of Civil Procedure, those having an interest might intervene and be made parties, or that the district court might have ordered them to be brought in; but nothing of the kind was done. The case stands as originally brought, and in that condition it must be decided.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

DOANE COLLEGE, PLAINTIFF IN ERROR, V. JOHN LANHAM, DEFENDANT IN ERROR.

[FILED MAY 16, 1889.]

1. **Arbitration: AWARD: WORK AND LABOR: SET OFF.** J. L. contracted with Doane College to furnish the material and mechanical skill for doing the brick work of one of the halls or buildings of said college, and agreed to complete the said brick work, except topping the chimneys, on or before July 1, next thereafter, and to forfeit to said college of his compensation for such material and mechanical skill, one hundred dollars for each week, which he should overrun his time in the completion of said work. The work not having been done in time, and certain differences and disagreements having arisen between J. L. and the building committee of Doane College, including the amount of forfeiture under said agreement, and the parties having agreed to submit to arbitration "some points and items

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of difference existing between said parties as to work to be done, material to be furnished, damage for alleged delay, etc.," before entering upon the arbitration, the following memorandum was entered upon the agreement to submit as expressing the points and differences submitted: "Memorandum—The matters are: stone for, freight upon, and setting, stone steps, and damages for delay in completing contract beyond July 15." The arbitrators made the following award: "First, Lanham to be relieved of the steps entirely. The college to do that work at their own expense. Second, no change to be made in estimate already made in brick-work done in basement around windows. Third, Lanham to pay Doane College the actual loss at rate of \$1.87½ per room per week, for each of the thirty rooms mentioned in Mr. Doane's statement, counting from beginning to end of fall term, rent on all rooms not occupied:

Total amount.....	\$675 00
Fourth, Lanham to pay Doane College twelve weeks' service of J. W. Malone at \$35.50.....	426 00
Loss freezing cistern water, etc.....	100 00
Total.....	\$1,201 00
Deduct from penalty five days at rate \$100 per week...	81 66
Total amount to be taken from contract price.....	\$1,119 34

An action being afterwards brought by J. L. against Doane College for mechanical skill, work, labor, and material furnished by him under the said contract for the erection of the said building, and for additional mechanical skill, work, and labor, rendered necessary in the erection thereof by reason of changes in the height and plan of said building, and Doane College having answered in said action, setting up the submission of said points and matters of difference between the said parties, to arbitration, the award of said arbitrators thereupon, which found that there was due to the said Doane College the sum of eleven hundred and nineteen dollars and thirty-four cents, and that thereupon the said Doane College did tender to said J. L. "the balance his due, of which the said" J. L. "took all except the sum of one hundred and twenty and twenty-one one-hundredths dollars, and which the said Doane College now owes the said" J. L., "which they have often tendered him, * * * which amount he refuses to accept, and the said college now presents said amount of money in court," etc.: *Held*, That the said award be sustained as a counter claim or set-off in favor of Doane College and against the claim of J. L. to the extent and amount of \$593.34, and no more.

2. **Work and Labor: TRIAL: EVIDENCE.** The contract was for putting up the masonry of Ladies' Hall, and furnishing all the brick and lime, cement and water, and all the labor necessary and of such quality as to put up the building in good workman-like manner in the shortest time possible, consistent with good work, etc., with all the ordinary specifications as to the manner of doing the work and providing the manner of measuring the same, and providing for paying for the same, when completed and accepted, at the rate of \$10 per 1,000 of brick where the walls have one side of the repressed brick, which was to include chimneys, and \$12 per 1,000 where the walls have two sides of repressed brick; also for paying in addition to the price named, seventy-five cents per 1,000 of bricks for all brick masonry laid in mortar made in part with hydraulic cement, etc. There being neither plan nor drawing of said building showing the height thereof, exhibited to the contractor, nor present at the time or previous to the entering into said contract, nor any specification or clause in said contract, stating or indicating the height of which said building was to be, nor the number of stories it was to contain; and there being evidence on the trial tending to prove that the contractor, without inexcusable negligence on his part, entered into the said contract in the honest belief and expectation that the brick walls of said building were to be, and that he would be required to build them, only two stories high; and there being also evidence tending to prove that the mechanical skill and labor necessary to build and erect the brick-work of the third story of the three-story walls and building, which, by the building committee of the defendant under the said contract, the contractor was required to and did actually build for the defendant, was actually worth at the rate of three dollars per thousand brick for one hundred and eighty-nine thousand, four hundred and one bricks, more and in excess of the average of that required to build and erect the same building of two stories in height only; there also being evidence tending to prove that said contract was entered into by both of the parties in view of the said building being erected upon a foundation and foundation walls then being constructed under another and separate contract by the said J. L., without change in the shape or character of the walls thereof, but that before the erection of the brick-work of said building, the plan and character of said foundation was changed from plain corners to buttressed corners; that said contractor was required and did build the walls and brick-work of said building to conform to said foundation so changed at an additional cost of skill, mechanical work, and labor, to the contractor, of the sum of thirty dollars; and there being evidence

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tending to prove the laying and placing in the walls of said building by the contractor, of a number of thousands of brick and a quality and kind of workmanship that under the terms of the said contract would amount to a sum which, added to the amount of compensation for the extra work as above set out and stated, and after deducting all moneys paid to the contractor under said contract and the amount of defendant's counter claim or set-off, allowed as above stated, would still leave an amount due to the contractor above the amount of the verdict: the verdict is sustained and judgment affirmed.

ERROR to the district court for Saline county. Tried below before BROADY, J.

Daves & Foss, for plaintiff in error, cited: *Mills v. Miller*, 4 Neb. 444; *Coffing v. Taylor*, 16 Ill. 457; *Congregational Society v. Perry*, 6 N. H. 164; *Brown v. Bellows*, 4 Pick. (Mass.) 192; *Chase v. Strain*, 15 N. H. 535; *U. S. v. Packages*, 17 Howard, 96; *De Castro v. Brett*, 56 How. Pr. (N. Y.) 484; *Perkins v. Giles*, 50 N. Y. 228; *Morse, Arbitration and Award*, 171, 172; 6 Wait's Act. & Def. 526.

Abbott & Abbott, for defendant in error, cited: *Hall v. Vanier*, 6 Neb. 85; *McDowell v. Thomas*, 4 Id. 544; *Buntain v. Curtis*, 27 Ill. 374; *Johnson v. Noble*, 38 Am. Dec. 485; *Stewart v. Case*, 42 Id. 534.

COBB, J.

This action was commenced in the district court of Saline county, by John Lanham against Doane College. The plaintiff in his petition alleges that Doane College is a corporation under the laws of this state; that on or about April 10, 1884, he contracted with the college through Thomas Doane, its legally authorized agent, to furnish the material and labor and to build and complete for Doane College the brick-work for a college building then being built for defendant on its grounds at Crete, Nebraska, and

known as Ladies' Hall; that it was then and there agreed between the parties that the price of said labor and material should be: for brick laid in the wall with mortar mixed partly with cement, and with both sides of wall faced with repressed brick, \$12.75 per one thousand brick; that chimneys should be computed as solid, and each cubic foot of such masonry, including door and window openings, should be computed to contain two hundred and twenty-four and one-half bricks; that it was then and there verbally agreed by and between said parties that said work should be built on a foundation the dimensions of which were then determined, and should be two stories high, with plain outer walls, similar to those of the college building then standing on said grounds, and should contain as nearly as could then be estimated, a total of 275,000 brick; that subsequently and after said work was commenced, the plan was so changed by defendant as to make the main part of said building three stories high, instead of two as originally agreed upon, with outer walls buttressed instead of plain; that the plaintiff, without any agreed price therefor, did, at the request of defendant, proceed to furnish the labor and material and build and complete the third story, and the outer walls with buttresses instead of plain, according to said change of plan; that said third story contains the amount of 195,000 brick; that the first and second stories contain the total amount of 275,000 brick, all of which is laid in mortar mixed with cement, according to contract; that of said 275,000 brick, two-thirds are faced on both sides with repressed brick, and the plaintiff, according to said contract is entitled for building the same to the sum of \$12.75 per thousand; that the remainder, or one-third part thereof, were faced on one side with repressed brick, and the price of laying the same, according to the contract, is \$10.75 per thousand. The plaintiff alleges that the extra expense of laying the third story over those of the first and second, amounts to \$3 per thousand, and that to furnish

material and labor and to build the third story of said building was worth \$15.75 per thousand of brick for walls faced on both sides with repressed brick, and \$13.75 per thousand for walls with one face of repressed brick laid in mortar mixed with cement, as stated; and that of the 195,000 brick laid in the third story of said building, 75,000 were faced with repressed brick on both sides, and 120,000 were so faced on one side; that all are laid with mortar properly mixed with cement; that the labor necessarily employed on the outer walls, buttressed instead of plain, is worth the sum of \$15; and that the labor and material expended in the erection of the third story and the change in the outer walls amounts to \$2,846.25. The plaintiff alleges that the total labor and material for the completion of the brick-work, according to the contract price for the first and second stories, and the actual value of labor and material for the third story, amounts to \$6,170.50, furnished at the request and under the direction of defendant, completed September 1, 1884, and was accepted by defendant, whereby the defendant was and is liable to the plaintiff for the full amount thereof.

The plaintiff alleges that there has been paid him on said work by the defendant the sum of \$3,740, and no more, and that there is due the sum of \$2,430.50, and that though said last-mentioned sum has been due since September 1, 1884, the defendant has neglected to pay the same or any part thereof; wherefore the plaintiff prays judgment therefor with interest thereon from September 1, 1884, and costs.

Doane College, by its answer, denied all the allegations of the petition except those in the answer expressly admitted.

For a second defense it admitted that it entered into a contract with John Lanham, April 10, 1884, for the erection of a building upon the college grounds, to be known as "Ladies' Hall;" that said contract was in writing, a

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copy of which is made exhibit "A" to its answer; that it contains no provision as to the height or number of stories of the building; that it provides for all the work thereon at the agreed prices set forth therein, and denies that there was any other contract than that set forth in exhibit "A;" and further denies that there was any verbal contract changing, modifying, or enlarging it, as alleged in the plaintiff's petition, but avers that all of the work done by the plaintiff on said building was at the contract price as set forth in exhibit "A;" that upon the completion of the building, the matters in controversy between the contractor and the college, as to the completion of the building, were placed before and considered by the building committee of said college, which refused to pay the same; and that finally all the matters of difference between the parties were submitted to arbitration, in writing, a copy of which is made exhibit "B" to its answer; that in pursuance of said submission, J. J. Butler, T. E. Calvert, and J. H. Ames, arbitrators, made and published their award that there was due to the said Doane College the sum of \$1,119.34, which is made exhibit "C" to its answer; that the college then tendered the contractor the balance due him, which was accepted, except the sum of \$120.21, which is now tendered him, and brought into court.

The defendant further avers that the amounts which were due the plaintiff as contractor and builder, were as follows:

PART OF BUILDING.	BRICKS, M.	PRICE.
Center house.....	141,701	\$1,608 80
Stair halls, two ends and south side.....	72,188	829 01
East wing.....	112,382	1,214 08
West wing.....	111,967	1,286 26
Ladies' porch.....	3,011	38 08
Gents' porch.....	5,381	68 02
Rear porch.....	3,880	49 09
Total.....	450,510	\$5,093 34

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Amount reserved on foundation work (voucher No. 66).....	\$300 00
Stone foundation of steps, 11.18 perch @ \$3.50.....	39 13
One stone window sill used in gas house.....	2 75
1,250 brick used in cistern @ \$8 per thousand.....	10 00
Fifty-three hours' work of younger Chowins, @ 25c per hour.....	13 25
Putting date of 1884 in brick work.....	15 00
Ten per cent interest on Chowin's labor.....	1 33
Total.....	\$5,474 80

That there was paid to the plaintiff the following sums:

June 10, voucher No. 50.....	\$586 50
July 10, voucher No. 59.....	1,153 45
August 11, voucher No. 84.....	782 00
September 16, voucher No. 119.....	1 75
September 20, voucher No. 129.....	1,173 00
October 7, voucher 147.....	9 51
October 11, voucher No. 158.....	22 11
October 18, voucher No 164.....	400 00
December 9, voucher No. 242.....	3 28
July 26, voucher No. 78, grading cellar.....	11 25
August 2, voucher No. 79.....	17 00
August 23, voucher No. 96.....	3 75
December 13, voucher No. 257, painting wall, E. basement...	8 50
Nine and one-half barrels cement.....	22 32
One barrel of lime.....	1 25
April 17, 1885, voucher No. 323, for brick work of Chowins, etc.....	39 58
Amount of award of referees.....	1,119 34
Total.....	\$5,354 59

Leaving a balance due John Lanham, as hereinbefore stated, of \$120.21, which amount has often been tendered, as before stated.

"*Exhibit 'A.'*"—I, John Lanham, of Crete, Nebraska, mason, hereby agree to put up the masonry of 'Ladies' Hall,' so called, at Crete, Nebraska; to provide at my own expense all the brick, the sand, lime, cement, and water, and all the labor necessary, and of such quality as to put up the building in good workman-like manner, in the shortest time possible, consistent with good work, and to increase or di-

minish the working force to such extent as shall be deemed the best by the building committee of the said 'Ladies' Hall,' and to give said building committee power at short notice to discharge such men as seem to them incompetent or disobedient of orders. The brick walls on the exterior of the building, are to have an outer wall of two bricks, or two inches, an open air-space of about two inches, and two walls and the air-space together are to be laid accurately by line, both sides, to a thickness of fourteen inches, except as to the chapel and dining room, where, between doors and windows, there will be an additional inside thickness of pilasters of one brick, or four inches, making altogether eighteen inches.

"In the chapel the pilasters will be joined together over the windows and doors by arches of brick, but in the dining room the pilasters are to be built perpendicular from bottom of windows to ceiling, and the panels will have a cornice at top made by corbelling out the bricks. The outside of the brick exterior walls and chimneys is to have one course of four inches of repressed bricks all around, and the chapel and dining-room and the three porches, and the stair well to the top, are to have one course of four inches of repressed bricks, inside as well as outside. The bricks are to be suitable for the purpose every way, and are to be furnished in suitable quantities, quality, and at suitable times, so that the building may be pushed forward to completion in time for occupancy at the beginning of the autumn college term this year. I agree to provide at my own expense all necessary staging, to thoroughly fill the masonry with mortar. The mortar is not to have more than two parts sand to one part of lime and cement combined, and if the mortar so made shall not have sufficient strength, then the proportions of materials must be changed. The lime and cement are to be fresh made. The lime for mortar is to be slaked in large quantities, and kept constantly on hands for use, and, if required, one part of hydraulic

cement shall be used to two parts of lime, but the cement shall not be added except as used; and no mortar having cement in it shall be left over night and used afterwards. If the mortar made, as before stated, shall prove unsatisfactory, it must by proper changes be made satisfactory to the committee. All joints in repressed brick, whether outside or inside, are to be struck. John Lanham is to place in the brick-work all irons required. The outer and inner walls are to be properly tied together at distances to be fixed by the committee, and at the floors the outer and inner walls shall be joined and be solid clear through for a height of five courses of brick.

"This contract includes all brick-work necessary above the top of water-table course, and all the chimneys, etc., and all work done is to conform to plans furnished, and is to be done under the supervision of a master mason to be appointed by the building committee, and to their entire satisfaction and acceptance; contractor to provide water to wet bricks when required.

"The measurement of bricks shall include all window and door openings, but is not to include the two-inch air-space. Chimneys are to be measured solid. Pilasters are to be measured across their faces, plus their two edges or projections from the main walls. Twenty-two and a half bricks are to be reckoned to the cubic foot of masonry. The brick-work of the entire building, except the topping of chimneys, is to be completed on or before July 1, next. I, John Lanham, also agree to forfeit to the college \$100 of my dues under this contract for each week I shall overrun my time in the completion of this work.

"The entire work embraced in this contract is to be properly protected by John Lanham at his own expense from rain and storms during the progress of the work, and he agrees to be held responsible for damage to the work till its completion and acceptance. Doane College hereby agrees to pay for the above-specified work, when accepted, at the

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rate of \$10 per 1,000 of brick where the walls have one side of repressed brick, which is to include chimneys, and \$12 per 1,000 where the walls have two sides of repressed brick.

"Doane College also agrees to pay in addition to the prices named above, seventy-five cents per 1,000 of bricks for all brick masonry laid in mortar made in part with hydraulic cement, making \$10.75 for the one part and \$12.75 for the other part. Doane College also agrees to pay John Lanham \$100 premium for each week of time saved in the completion of his part of the contract. Doane College will make payment to John Lanham under this contract on the 10th day of each month at the rate of 85 per cent on the amount of work done during the previous calendar month; and final payment will be made in one month from the time of the completion and acceptance by the building committee. The amount of money heretofore advanced to John Lanham for bricks is to be deducted from the first payment to be made under this contract.

"The college agrees to provide the necessary plans of the work to be done, and hereby reserves the right to annul this contract provided it is not, in the opinion of the building committee, performed on the part of John Lanham, and the payments then to be made him shall be determined by the said committee, and shall be a final adjustment of his claims.

"Any changes in this contract mutually agreed upon shall be made in writing and attached hereto. Lincoln, Nebraska, April 10, 1884.

"[Signed]

JOHN LANHAM.

"DOANE COLLEGE,

"By *Thomas Doane, Chair. Build'g Com.*"

"*Exhibit 'B.'*—Memorandum of agreement made this 11th day of December, 1884, between the Building Committee of 'Ladies' Hall,' Doane College, and John Lanham, contractor. Whereas, in the completion and proposed

settlement for said 'Ladies' Hall' under contract with Lanham, there are some points and items of difference existing between said parties as to work to be done, material to be furnished, damage for alleged delay, etc., which the said parties are unable to agree upon; now, therefore, it is agreed to submit the same to arbitration as follows:

"Each party to select one person, these two to select a third, the same to comprise a Board to whom shall be submitted all and any papers, facts, figures, statements, etc., bearing upon the matters in controversy, which shall then be considered and decided by said board of arbitration, the parties hereto agreeing to be bound by said decision, and not to appeal therefrom. Said matters to be taken up and brought to conclusion immediately.

"[Signed]

JOHN LANHAM.

"THOMAS DOANE,

"Chairman Building Committee, Doane College."

"*Memorandum*: The matters of difference are stone for, freight upon, and setting, stone steps, and damages for delay in completing contract beyond July 15."

"*Exhibit 'C.'*—Memorandum—*First*: Lanham to be relieved of the steps entirely, the College to do that work, at their own expense.

"*Second*: No change to be made in estimate already made on account of brick-work done in basement around windows.

"*Third*: Lanham to pay Doane College the actual loss at rate of \$1.87½ per room per week for each of the thirty rooms mentioned in Mr. Doane's statement, counting from beginning to end of fall term, rent on all rooms not occupied; total amount..... \$675 00

"*Fourth*: Lanham to pay Doane College twelve weeks' service of J. W. Malone, at \$35.50..... 426 00
Loss, freezing cistern water, etc..... 100 00

Total.....\$1,201 00

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Deduct from penalty 5 days, at rate of \$100 per week.....	81 66
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Total am't to be taken from contract price, \$1,119 34

Arbitrators to be paid by College:

Fees \$50.....	JOHN H. AMES,	} Arbitrators."
"	J. J. BUTLER,	
	T. E. CALVERT,	

The plaintiff replied to the defendant's answer as follows:

First. That exhibit "A" to defendant's answer is not a contract, but merely a memorandum upon which the contract, which rested on parole, was based; that said memorandum merely describes the manner in which the work was to be done, the price therefor, and the time in which it was to be completed; that it nowhere pretends to give the dimensions or height of the structure to be built, which were as in the plaintiff's petition alleged.

Second. The plaintiff denies that the matters set up and claimed by him were ever submitted to arbitration, or that there was an arbitration of the same or any part thereof; but that they are wholly unsettled, and that the amount claimed is due him from the defendant.

* * * * *

Fourth. That plaintiff denies each allegation of new matter in the answer contained not herein specifically admitted or denied.

Fifth. That there was a pretended arbitration of something in the memorandum of submission mentioned, but that it took into consideration matters not contained in nor contemplated by said submission; that they refused to consider matters proper for them to consider, which would have been to the advantage of the plaintiff, if considered; that they refused to hear the plaintiff in his own behalf, but heard only the defendant; that the defendant presented to them false and unjust accounts, which they allowed without hearing the plaintiff or giving him an opportunity to be heard, whereby the pretended arbitrament and award is

void in law, and the plaintiff prays judgment according to the prayer of his petition.

There was a trial to a jury with a verdict and judgment for the plaintiff. The cause is brought to this court on the following assignments of error:

"1. The court erred in admitting testimony on behalf of the plaintiff.

"2. In giving the second and third paragraphs of instructions asked for by the plaintiff.

"3. For refusing to give the first, second, third, fourth, and fifth, instructions asked for by defendant.

"4. In giving the first, second, third, fourth, and fifth, paragraphs of instructions on its own motion.

"5. The verdict is contrary to the last-mentioned instructions of the court.

"6. The verdict is not sustained by sufficient evidence.

"7. The court erred in rendering judgment for the plaintiff and in not rendering it for defendant."

On the trial the plaintiff testified as a witness on his own behalf, over the objections of the defendant, that he made a contract with Mr. Doane about the 10th of April, 1884, for the erection of the brick-work upon Ladies' Hall at Crete, Nebraska; that there was a writing signed by him, and by Mr. Doane, on the part of the defendant. Witness recognized defendant's exhibit "A" as the writing, and admitted his signature thereto as genuine. The plaintiff's counsel asked the following question:

What was to be the height of that building mentioned in the written contract? [To which the defendant objected as irrelevant, immaterial, and incompetent, which objection being overruled, the plaintiff offered in evidence the contract referred to as the defendant's exhibit "A," which was received without objection, and the witness answered:]

There was no height given in the contract; it was just verbally given. Mr. Doane met me in Lincoln, with the

contract in his possession, * * * * and told me he wanted me to sign that contract as it was written except as to the time of the completion of the building.

Q. State just the conversation between yourself and Col. Doane, at that time, about the size and height of that building and where it was to stand? [To which the defendant objected as immaterial, irrelevant, and incompetent, which objection was overruled, and exceptions taken.]

A. After the contract was written up, Mr. Doane asked me to go into bond to complete the building by the 15th of July. [To which the defendant objected as immaterial, irrelevant, and incompetent.]

Q. Give the dimensions of the building.

A. I asked Mr. Doane how much brick it would take, and he told me the approximate estimate would be 275,000. [The defendant objected that the answer was not responsive, which was overruled and exceptions taken.] Mr. Doane told me there would be 275,000 brick, and I based my figures upon what would be necessary to put the 275,000 brick up, and no more.

Q. Where was the building to stand? On what foundation?

A. It was to stand upon the foundation we were then building; it was not then up.

Q. How many stories would 275,000 brick build on that foundation? [The defendant objected to the question as incompetent, and the witness not shown to be qualified. Overruled, and exception taken.]

A. If the building had been foot walls, as first talked of, the 275,000 would have built the two-story building.

Q. What thickness was specified?

A. I think the contract states.

Q. What did he say of the wall of the building—with what did he compare it?

A. He compared it as similar to Doane College.

Q. Merrill Hall?

A. Merrill Hall was similar to Doane College; that is a two story building.

Q. State what was said upon that subject? How was Merrill Hall built?

A. It was built plain, except the roof projection.

Q. How are the walls of Merrill Hall built?

A. There are some small projections at the top at the gutter.

Q. The brick transoms at the gutter all the way round, and the mansard from that up?

A. Yes, sir.

Q. How about the buttresses in Merrill Hall? [The defendant objected as immaterial, irrelevant, and incompetent. Overruled, and exception taken.]

A. There were no buttresses in Merrill Hall.

Q. How were the walls of Ladies' Hall building in that respect?

A. They were buttressed upon the north wing.

Q. When did you first learn that the building was to be three stories instead of two?

A. I think about the 10th of July, if I remember aright.

Q. When were you first required to buttress those walls, instead of the building they planned?

A. That was at the start of the brick work.

Q. Before or after the signing of this paper?

A. I knew nothing about the buttress until after the signing of the paper.

Q. How much more was that worth to build those walls buttressed as they are instead of building them plain as upon Merrill Hall? [To which the defendant objected as immaterial, irrelevant, and incompetent, which objection was overruled, and exceptions taken.]

A. At each corner of the building there are four corners instead of one, and the building of those buttresses will take more time than to turn any ordinary corner, because every

one of them have to be plumbed separately. It is worth considerably more. I suppose for the amount of brick there is in it, it is worth four times what it is to build an ordinary corner.

Q. How much more is that labor worth?

A. Fifteen dollars per thousand to lay those buttresses.

Q. What is the total extra amount of labor to build those buttressed instead of plain?

A. That would be about thirty dollars.

Q. How many brick are there in the first and second stories of that building?

A. Two hundred and fifty-nine thousand, one hundred and forty-seven.

Q. How many in the upper or third story—total?

A. One hundred and eighty-nine thousand, four hundred and seventy-one.

Q. How much more per 1,000 is it worth to put those brick in the upper story than in the first and second stories?

A. Three dollars. [The defendant objected. Objection overruled, and exception taken.]

Q. When did you first learn that you was expected and required to build that building three stories high instead of two, according to the first contract?

A. On or about the 10th of July; it was in the beginning of July.

Q. Did you then go on and build this building three stories high?

A. I did.

Q. How many brick total did you put into that building?

A. Four hundred and fifty-eight thousand.

Q. How many in the first and second stories?

A. In the first and second stories, 311,984.

Q. In the third story?

A. One hundred and forty-six thousand, four hundred and twenty-one.

Q. Of the brick in the first and second stories, how many were faced both sides—were refaced brick?

A. One hundred and twenty-two thousand, five hundred and thirteen.

Q. That is, faced on both sides, were repressed brick?

A. Yes, sir.

Q. Was the balance faced at all?

A. Yes, sir; on one side were repressed brick.

Q. What kind of mortar were all those bricks laid in?

A. In mortar partially mixed with cement.

Q. How many in the upper story were faced with repressed brick?

A. Seventy-six thousand, six hundred and ninety-five, both sides.

Q. How about the balance in the upper story?

A. Sixty-nine thousand, seven hundred and twenty-six faced on one side with repressed brick.

Q. What kind of mortar were all those bricks laid in?

A. They were all laid in cement mortar.

Q. How much total in money did that contract come to, if you have it figured?

A. I figured it at \$5,296.56.

Q. How much pay have you received on that contract?

A. I have received \$3,700.

Q. Is the remainder unpaid?

A. It is; \$1,596.56.

On cross-examination by Mr. Foss, the witness stated that he had the contract for putting in the foundation of the Ladies' Hall; that he commenced work on the foundation in October, 1883, and completed it about June 10, 1884; was working on it at the time he made the contract for the brick work hereinbefore stated; that in the fall of 1883 he sold to the building committee of Doane College 100,000 brick to be used on the construction of Ladies' Hall.

Q. When you built this foundation, was it made for the purpose and fit for putting buttress wall upon?

A. When it was completed; but we changed the foundation in the spring to make those buttresses. That delayed the foundation till June. If the change had not been made we would have got through in April.

Q. It was changed for the buttressed work?

A. Yes, sir.

Q. The original plan for the foundation did not show that it was made for buttresses?

A. No, sir.

Q. Was not the original plan of the foundation there all the time?

A. Yes, sir; I had it. We had to put in little corners to meet those stone, and the old foundation was torn up and put in again. Those buttresses were put in after that.

* * * * *

Q. You say he had no plans?

A. No, sir; he didn't have any.

Q. You entered into this contract without seeing any plans at all?

A. Yes, sir.

Q. How long have you been in the contracting business?

A. Seven or eight years. * * *

Q. You entered into the contract without any plans of the buildings?

A. I did. I took the men's word for the kind of work and amount of brick, of course.

Q. You based that upon the estimate of 275,000 brick to go into the building?

A. I did.

Q. Without a reference to any height?

A. Yes, sir.

Q. You had to put that in so that the walls would be thick enough for that much?

A. Yes, sir.

Q. You say that it was worth three dollars per thousand

more to put the brick in the third story than in the first and second story?

A. I do, in that building.

Q. How much more did you have to pay your masons for putting those brick in the third story?

A. I didn't pay them any more per day.

Q. How much more per day did you pay your tenders than you did in the first and second stories?

A. I think it was fifteen cents per day more than the other, and I think it was twenty-five cents.

Q. What men did you pay that to?

A. To the laborers.

Q. Do you swear that you paid the carriers and tenders fifteen and twenty-five cents per day more upon the third story?

A. I do.

Q. How many more tenders did it take?

A. It took mighty near twice the amount to carry the brick and mortar.

Q. How many tenders for each mason for the first and second stories?

A. I don't remember just how many I had.

Q. You don't know how many you had for the third story?

A. I know I had to have more, or they could not have laid the brick.

Q. You say you didn't pay your masons any more for the third story than on the first and second?

A. Not per day; but the brick-layers could not lay as many brick per day as in the first and second stories. I know they can't get as many brick laid upon the third story. They were further up, and were not in shape to lay them as quick.

By the court: State whether that alteration was made before or after the contract was made?

A. Quite a number of them afterwards.

[The defendant's objection to the question was overruled by the court, and exception taken.]

Q. You say you learned there was to be a third story put upon this building between July first and tenth?

A. Yes, sir.

Q. That is the first time you knew of that?

A. Yes, sir.

Q. I will call your attention to the testimony in this case before; and didn't you testify that you learned of it in April, when the brick-layers first came to work upon this building, and told you that it was to be a three-story job, and that they wouldn't take the job?

A. I learned it from them, but I didn't learn it from Col. Doane. When I tried to find it out I couldn't find it out; and the brick-layers that I let the contracts to came to do the work some time in May, and they went to Mr. Doane and found out there was a third story; and they came to me, and I said, No; it can't be. It is only to be a two-story building. And I went to Mr. Doane, and he said those men didn't want to work; "You had better get some one else to do the work;" thus intimating that there was to be only two stories.

Q. Did you at that time consult the plans of the building?

A. No, sir; I don't know whether there was any there or not.

Q. Did you ever ask him to see the plans of the building?

A. No, sir.

Q. As a matter of fact the masons had the plans of the building to work from?

A. They might have done so. I was not there much.

Q. Who did have charge of your building?

A. Goering and ———.

Q. Who else?

A. I don't think of any one else.

Q. Did Mr. Malone have charge of the brick-work?

A. They said he did. He was digging ditches more than anything else, I think. He was put there to have charge of the work.

Q. The work was done under his directions?

A. As far as I know I think Mr. Doane did the most of the directing. I was not there much myself. I could not say. I was there once a week, or something like that.

The plaintiff being recalled before the close of the evidence, was further examined as follows:

Q. What, if anything, did Col. Doane say to you about the plans at the time you signed the contract up at Lincoln?

A. When I asked the colonel about the number of brick that there were to be put into the building, he said there were two hundred and seventy-five thousand; that he had no plans with him; that he had left them—I think it was in Milwaukee—to be figured on, and that was his estimate. Of course I based my figures upon the two hundred and seventy-five thousand brick, just what he told me.

The plaintiff was cross-examined as follows:

Q. You say that Mr. Doane told you about these plans? You say he said they were in Milwaukee?

A. I think he said Milwaukee. He said they were having them figured on back east.

Counsel for plaintiff in error in the brief say in the introduction that "In arriving at a decision of the questions which are involved in this case, the court will have to decide the following matters:

"1. To construe the contract for the building of said Ladies' Hall, between John Lanham and Doane College; that is, to determine whether it was a contract; if so, whether it was complete in and of itself.

"2. To put a legal construction upon the memorandum

of agreement to submit all matters in dispute to arbitration.

"3. To decide whether the decision of the arbitrators is final and binding between the parties."

I will first examine the proposition numbered 2 above. But in placing a construction upon the memorandum of agreement to submit all matters in dispute to arbitration, we find at the outset that we are in a great measure relieved of this duty by the defendant having placed a construction thereon, which construction was followed by the trial court in its instructions to the jury, and acquiesced in by the plaintiff. The defendant did not plead the submission of and award upon "all matters of difference," in its answer, as a bar to the action; but, as was understood by the trial court, and as I think, correctly, it pleaded the submission to and the award of the arbitrators, upon certain matters of difference between the parties as a counterclaim or set-off, leaving the plaintiff's cause of action as set out in the petition to be met by the denial, and other allegations of the answer. We need spend no time, therefore, in considering whether it is the true construction of the memorandum of agreement that all differences between the parties should be submitted to arbitrators or not. What was submitted primarily must of course be gathered from the language of the articles or memorandum of submission. By reference to the agreement to submit, the language seems sufficient to embrace all of the matters mentioned in the plaintiff's petition, if they constituted points or "items of difference between the parties, as to work to be done or material to be furnished," as well as "for damage for alleged delay" under the contract for the erection of said Ladies' Hall. But it seems that the language of the agreement to submit was deemed to be too general, hence the memorandum which it is testified was made by a member of the building committee of the defendant in the presence of the plaintiff, and, it is alleged, with his ap-

proval. A fair construction of the language of this memorandum limits the submission to the items of stone for the building, freight upon stone for the building, setting stone steps, and damage for delay in completing the contract beyond July 15. Whether the plaintiff would be held to be bound by this limitation or not, the evidence leaves no room for doubt that the defendant is.

The exigencies of the case do not require a lengthy discussion of the law of arbitration and award, to arrive at a conclusion as to the legal force and effect of the award in this case. Without following the cases or authorities cited by counsel, it will be assumed to be the law, as contended for by counsel for the plaintiff in error in the brief, that "A written submission may be extended without writing at the hearing, by mutual consent, to include additional matters;" and I think that it may be added that "the submission by both parties of such matters, and of evidence concerning them, without contemporaneous objection," is evidence of such intention. But in the case at bar there is an entire want of evidence of an extension of the submission either with or without writing, or by the submission, by both or either party of evidence concerning any matter outside of the items or matters of difference specified in the memorandum above referred to. I assume it also to be the law that where an award consists of several distinct and severable items or differences, some of which are within the agreement or articles of submission, and some of which are without the same, either as originally submitted, or as extended as above, it may be sustained as to those items or points of differences within the submission, and rejected as to those without.

In the case at bar, the award does not embrace or extend to the item of stone for the building, nor to the item of freight upon stone for the building. By its terms the plaintiff is relieved of any and all claims of the defendant upon him under the contract for setting stone steps. The

items of "loss by freezing cistern water, etc.," for which the arbitrators made an allowance of \$100, and of "twelve weeks' services of J. W. Malone, at \$35.50 per week, amounting to \$426, against the plaintiff, not being embraced in the memorandum of submission, and there being no evidence of an extension of the submission to cover such items, by both parties, in the manner above indicated, but on the contrary the fact of such extension being negatived by evidence on the part of the plaintiff, such items of the award must be rejected as without the scope of the award. The defendant's counter-claim must be held, therefore, to be sustained by the evidence to the extent of \$593.34, the amount awarded to defendant for actual loss at the rate of \$1.87½ per room per week for each of the thirty rooms mentioned in Mr. Doane's statement, counting from beginning to end of fall term, rent on all rooms not occupied; total amount, \$675, less deduction of penalty five days at rate \$100 per week, \$81.66.

I now approach the task of putting a construction upon the contract for the building. This contract by its language, assumes that the general character, including the length, depth, and elevation, of the proposed building, was known to the contracting parties. No plan of the building is referred to as being then present, nor as having been seen by the contractor, nor as being contemplated by him, nor as governing the price of the material or labor necessary to the execution of the contract. Indeed, as I understand it, no general plan of the building to be erected, is referred to in the contract at all. The only reference to a plan or plans contained in the contract is in the following words: "All work done is to conform to plans, to be furnished and be done under the supervision of the master mason to be appointed by the building committee, and to their entire satisfaction and acceptance. * * * The college agrees to provide the necessary plans of the work to be done." This language, doubtless, refers to the working plans, or

drawings showing the details of the work, and not necessarily nor ordinarily giving any information as to the height of the building, or the number of stories of which it should consist; and even these plans are not spoken of as having been seen by either of the parties, or even as having been drawn or prepared at the date of said contract. In so far, then, as its language is concerned, this is not a contract to erect a building of any specific height. This being the case, and it appearing from the pleadings that the price of the mechanical work and labor was agreed upon by the plaintiff when he joined in the execution of the said contract in view of the building to be erected being but a two-story building, and that the mechanical work and labor necessary to the erection and completion of the three-story building which he was required to erect by the building committee of the plaintiff, pursuant to the stipulations of said contract, and which he did in fact erect and complete, was reasonably worth more than the mechanical work and labor necessary and sufficient to the erection and completion of a building of two stories only, according to the stipulations of the said contract, and such allegations of the petition being traversed and denied by the answer, it became and was necessary and proper on the part of the trial court to let in and admit testimony showing the facts existing at the time of the execution of the contract, and the circumstances of the parties, and of the building, and of its foundation then partly completed, as well as of the other buildings of the college, of which the building erected under the contract constituted a component part; and it was the duty of the jury to find from the evidence whether the plaintiff entered into the said contract in view of the erection and of being required to erect a building of two stories only, and if so, whether the mechanical work and labor necessary and actually bestowed upon the erection of the three-story building that was erected, was worth more, and how much more, per thousand bricks, upon the principle of measure-

ment and compensation fixed and agreed upon in the contract, than the mechanical work and labor necessary to the erection of a building of the same dimensions and workmanship, but of two stories only.

My limited time and space forbid my indulging in a review of the evidence or of the instructions. But an examination of the evidence herein reported will leave no room for doubt that there was sufficient before the jury to warrant them in finding that the plaintiff contracted and was in a sense justified in contracting in view and contemplation of the erection of a building of two stories only. The plaintiff, when on the stand as a witness in his own behalf, testified that at the time of the execution of the contract, Colonel Doane, who acted throughout the transaction on behalf of the building committee of Doane College, stated to him that * * * "he had no plans with him, that he had left them, I think it was in Milwaukee, to be figured on—he said they were having them figured on back east." He further testified that he never saw a plan of the building showing it to be three stories high, during the entire progress of the work, and that when he learned from his brick-layers that it was to be a three-story job, he went to Colonel Doane and told him what the men said; that thereupon he replied; "Those men don't want to work; you had better get some one else to do the work." It is true that all of this evidence is contradicted by that of a witness on the part of the defendant. But the right as well as the duty of deciding upon conflicting testimony, is with the jury, and will not be controlled by any appellate court.

It appears from the bill of particulars that at the time of the execution of the contract, the plaintiff was engaged, under another contract with the defendant, in constructing the stone foundation for the building to be known as "Ladies' Hall." This foundation, it appears, was originally not constructed with buttresses, but some time in the spring

he was required to take out the corners and rebuild them, providing for buttressed walls, which he did. The evidence leaves it in doubt whether this change was made before or after the execution of the contract for the erection of the building. If it was made after the execution of the contract, then there having been no plan of the building before the minds of the parties, they must be presumed to have contracted with reference to a plain and not a buttressed building; and the plaintiff having been required by the building committee of the defendant to build and having built a buttressed building, he would be entitled to the additional compensation which according to the evidence was earned by the builder in consequence thereof. And while, as above stated, the evidence leaves it somewhat in doubt whether the change in the form of the foundation was made after the execution of the contract, yet after verdict such doubt will be solved to the upholding of the finding of the jury. The evidence of the plaintiff is to the effect that the mechanical work, skill, and labor, of building the third-story walls, was worth three dollars per thousand brick more and in excess of the cost per thousand brick of building the first and second stories of the same building, and that there were 189,401 brick in the third story, making \$568.20; also, that the cost and a fair compensation for erecting the brick-work of said building, buttressed at the corners as the same was required to be built by the building committee of the college, and was built by the contractor, was thirty dollars more and in excess of the worth and a fair compensation for building it with plain corners.

There was also evidence before the jury—that is to say, the testimony of the plaintiff—that there were placed in the walls of said building by the plaintiff in all 458,000 brick; that 122,513 of said brick were laid in the wall faced on both sides, or were refaced brick, and that 335,487 were faced on one side only, and were repressed brick. Also, that the whole of said brick were laid in cement mortar.

Greenwood v. Cobbey.

Under the terms of the contract, the above quantities of brick laid in the above proportions, and all laid in cement mortar, would come to \$5,168.60. Add to this the above sums of \$568.20 and \$30, and we have a grand total of \$5,766.80. Deduct from this sum the sum of \$3,700, which the plaintiff acknowledges in his testimony to have received on the contract, and it leaves \$2,066.80. Deduct \$593.34, the amount of defendant's counter-claim or set-off, allowed as above, and it still leaves \$1,473.46. The verdict of the jury being within this amount, it is sustained by the evidence.

The judgment of the district court is therefore affirmed

JUDGMENT AFFIRMED.

THE other Judges concur.

HORACE A. GREENWOOD, PLAINTIFF IN ERROR, V.
THOMAS D. COBBEY, DEFENDANT IN ERROR.

[FILED MAY 16, 1889.]

1. **Slander.** In an action for slander brought by the city attorney of a city of the second class against the mayor thereof for using the following language to the council of the city: "He is unfit to hold the office of city attorney; his opinion is too easily warped for money consideration." *Held*, First, that as the words were spoken by the mayor to the city council, which had power to remove the officer, the statement, if made in good faith, was privileged.
2. ———. That the words charged did not necessarily indicate dereliction of duty or dishonesty, and were not actionable *per se*.
3. ———: **PETITION.** The third count of the petition examined, and *held*, not to state a cause of action.

ERROR to the district court for Gage county. Tried below before BROADY, J.

L. W. Colby, and *Chas. O. Whedon*, for plaintiff in error, cited: *Garr v. Selden*, 4 N. Y. 91; *Teall v. Felton*, 1 N. Y. 547; *South v. The State of Maryland*, 18 How. (U. S.) 403; *Haggart's Trustees v. Lord President*, 2 Shaw, Scotch App. 134; *Yates v. Lansing*, 5 Johns. 282; *Randall v. Brigham*, 7 Wall. 523; *Gray v. Pentland*, 2 S. & R. 23; *Larkin v. Noonan*, 19 Wis. 83*; *Mayo v. Sample*, 18 Iowa, 306.

J. E. Bush, and *J. E. Cobbey*, for defendant in error, cited: *King v. Root*, 4 Wend. 113; S. C. 21 Am. Dec. 109; *White v. Nichols*, 3 How. (U. S.) 266; *Palmer v. Concord*, 48 N. H. 217; *Pierce v. Oard*, 23 Neb. 828; *Ellsworth v. Hayes*, 37 N.W. Rep. (Wis.) 252; 4 Wait's Act. & Def. 305; *Cooley on Torts*, 211 to 216; *Howard v. Thompson*, 21 Wend. (N. Y.) 319; *Fawcett v. Charles*, 13 Id. 473; *Elam v. Badger*, 23 Ill. 498; *Wyatt v. Buell*, 47 Cal. 624; *Bourreseau v. Delroit*, 30 N.W. Rep. (Mich.) 376.

MAXWELL, J.

The defendant in error brought an action against the plaintiff in error in the district court of Gage county, to recover damages for slander, and on the trial obtained a verdict for \$1,500, and a motion for a new trial having been overruled, judgment was entered on the verdict.

There are three counts in the petition.

In the first and second counts the slanderous words are alleged to have been spoken on the 27th day of July, 1887. The charges in each of these counts need not be referred to, as for reasons which will presently be stated, there must be a new trial. In the third count, the words complained of are alleged to have been spoken on the 28th of July, 1887. The plaintiff in error objected to the third count as not stating a cause of action. This objection was strongly insisted upon in the court below and the overruling of the same is now assigned for error. The count is as follows: "The plaintiff for a third cause of action complains of the

defendant for that on the 28th day of July, 1887, and at divers other times, in the county of Gage and state of Nebraska, the defendant then and there being the mayor of the city of Wymore, in said Gage county, Nebraska, and this plaintiff being then and there the duly elected, qualified, and acting, city attorney of the city of Wymore, aforesaid, said defendant wickedly, maliciously, and knowingly, intending to injure, degrade, and defame this plaintiff, as such officer and city attorney, in a certain discourse, which he, the defendant, then and there had of and concerning this plaintiff as such city attorney, at a public meeting of the city council of said city of Wymore, and in the presence and hearing of a large number of people, falsely, wickedly, maliciously, and knowingly, did speak and publish the following false and defamatory words, that is to say: 'He [meaning this plaintiff] is unfit to hold the office of city attorney; his opinion is too easily warped for a money consideration.' Whereby and by means of which false and defamatory words, this plaintiff has been greatly injured in his good name as such officer, to his damage in the sum of five thousand dollars."

At the time indicated, Wymore was a city of the second class, having more than one thousand and less than twenty-five thousand inhabitants, and was governed by the provisions of article I, chapter 14, Compiled Statutes. The plaintiff in error was mayor of said city, and the defendant in error, city attorney thereof. Section 6 of the chapter aforesaid provides that: "At the time of holding the general city election in each year, there shall be elected a mayor, a clerk, a treasurer, a city engineer, and the councilmen hereinbefore provided for; and a police judge shall be elected at each biennial city election; and the mayor with the consent of the council may appoint a city attorney, and an overseer of streets, who shall hold their offices for one year unless sooner removed by the mayor, with the advice and consent of the council."

Section 10 provides that: "The mayor shall preside at all meetings of the city council, and shall have a casting vote when the council is equally divided, and none other, and shall have the superintending control of all the officers and affairs of the city, and shall take care that the ordinances of the city and of this chapter are complied with."

Section 12 provides that: "He [the mayor] shall, from time to time, communicate to the city council such information and recommend such measures as in his opinion may tend to the improvement of the finances of the city, the police, health, security, ornament, comfort, and general prosperity of the city."

There are other provisions in regard to the duty of the mayor in guarding and protecting the rights of the city, to which we need not refer.

The leading case in this country on the subject of privileged communications appears to be *Thorn v. Blanchard*, 5 Johns. 508. In that case the plaintiff in error, with twenty-three others, inhabitants of the same county, presented a petition to the council of appointment, stating that B., district attorney, was actuated by improper motives in his official conduct, and that from malice toward some, and the emoluments arising from the public prosecutions in other cases, gave rise to many indictments, and praying that B. might be removed from office, which petition was read by the council, who removed B. from his office. It was held that an action for a libel would not lie against A. at the suit of B. The first count of the declaration in that case is as follows: "Whereas, the said Anthony is, etc., yet the said Stephen, well knowing the premises, but contriving and wickedly and maliciously intending to injure the said Anthony, in his aforesaid good name, fame, credit, and reputation, and to bring him into public scandal, infamy, and disgrace, amongst his neighbors and others, the good citizens of this state, and to cause him to be dismissed and discharged from his said honorable and lucra-

tive office of district attorney, in the district aforesaid, heretofore, to wit, on the seventh day of April, in the year of our Lord one thousand, eight hundred and three, at Salem, in the county of Washington, to wit, at the city and in the county of Albany, aforesaid, did falsely and maliciously write and publish, or cause or procure to be written and published, a certain false, scandalous, and malicious libel, of and concerning the said Anthony, as such district attorney, of the tenor and effect following, that is to say: 'To the honorable the council of appointment of the state of New York: We, the undersigned, inhabitants of the county of Washington, (meaning the said Stephen and others, inhabitants of the county of Washington,) humbly represent that the manner in which the public prosecutions (meaning the criminal prosecutions of the good people of this state) have been managed by the present district attorney, (meaning the said Anthony, who was then and there district attorney, as aforesaid,) is highly improper; that, in our opinion, (meaning in the opinion of the said Stephen, and the other inhabitants aforesaid,) a number of indictments have been found by the influence of the district attorney, (meaning the said Anthony,) who (meaning the said Anthony) at that time was actuated by improper motives; (meaning that he, the said Anthony, as district attorney aforesaid, by undue influence in his said office, and from corrupt motives, has caused a number of indictments to be found;) that malice towards some, and the emoluments arising from the public prosecutions in other cases, have given rise to many indictments, (meaning that the said Anthony, as district attorney aforesaid, had, from malice in some cases, and for unlawful gain in other cases, caused many indictments.) Your petitioners, (meaning the said Stephen and the said other inhabitants,) therefore, (meaning for the false, scandalous, wicked, and malicious causes, above mentioned and pretended,) humbly pray, that Anthony I. Blanchard, the present district attorney, (mean-

ing the said Anthony, who was then and there district attorney as aforesaid,) may be removed from that office.' By reason and means of the writing and publishing of which said false, scandalous, and malicious libel, of and concerning the said Anthony, in manner aforesaid, the said Anthony is not only hurt and injured in his good name, fame, credit, and reputation, and brought into public scandal, contempt, infamy, and disgrace, but was afterwards, and after the publication of the said libel, and by reason of the unjust suspicions thereby excited, and the imputations thereby made against the moral character of the said Anthony, to wit, on the ninth day of April, in the year aforesaid, discharged from his said honorable and lucrative office of district attorney in the district aforesaid, to wit, at Salem, and in the county of Washington, that is to say, at the city, and in the county of Albany aforesaid; and hath ever since been deprived of all the honors, emoluments, and advantages, that would and otherwise might have arisen and accrued to him from the same office."

It will be observed that the plaintiff, in the declaration set out, alleges special damages sustained by himself in consequence of the alleged libelous acts complained of, viz., "His removal from office, and consequent loss of the emoluments thereof." No such injury is alleged to have resulted from the statement of the plaintiff in error in the case at bar. For aught that appears in the petition he still retains the office of City Attorney of Wymore, with the emoluments thereof, and has sustained no special damages. But, it is said, the words charged to have been uttered by the plaintiff in error, import the commission of a felony, and hence are actionable *per se*. It is alleged that the plaintiff in error was the mayor of Wymore, and the defendant in error city attorney. The statement is alleged to have been made by the chief executive of the city to the body empowered by law to investigate a charge, and, if found to be true, apply the proper remedy, and if false, dismiss

it. The statute gives the mayor "superintending control of all the officers and offices of the city." This control cannot be properly exercised unless he in good faith can, from time to time, call the attention of the council to the conduct of city officials, and give his own views as to any dereliction of duty on the part of any of them without subjecting himself to an action for libel, or slander. In order to state a cause of action in the petition, it must appear by appropriate allegations that the words were without legal excuse. And this is not done. The necessity of keeping the administration of public corporations pure and efficient, the importance of punishing derelictions of duty on the part of officials thereof, and the danger of silencing inquiry, all tend to render communications of this kind, if made in good faith, privileged, even though at times the effect of the rule may be to work injustice in particular cases. But the words themselves are not actionable.

A thoroughly capable and conscientious lawyer who is generally successful with his cases, may, by reason of interest, connection, or inclination, be unfit for a city attorney; and it need not be any disparagement of his general character. So in regard to the alleged charge that his opinion is too easily warped, etc. This is not necessarily a charge of bribery or dishonesty; and there is no statement in the petition that such a charge was intended. A court cannot extend the meaning of words beyond their plain import; nor will it, in determining the sufficiency of a petition, place a stronger meaning than the plaintiff has done on certain words in order to make them slanderous. In the case cited, it was held that where the complaint was made to the board authorized to redress the grievance, no action would lie against the complainant. This case is cited with approval in *Vanderzee v. McGregor*, 12 Wend. 545; *Howard v. Thompson*, 21 Id. 319; *O'Donaghue v. M'Govern*, 23 Id. 26.

All of the cases seem to agree that communications of

this kind are privileged, either absolutely, or when made in good faith. Absolute exemption is applied to the legislature and the courts, in order that investigations may be thorough, and the truth declared without fear or favor. The same rule probably applies to *quasi* judicial bodies in conducting their business. In the absence of authorities in cases like that under consideration, we deem the better rule to be that communications of the kind indicated are privileged when made *bona fide*. In other words, when such communications are made against an officer in good faith, and the privilege is not abused, the officer making the charges is not liable. There is no claim that the plaintiff in error abused his privilege, nor that he did not act in good faith. The third count of the petition, therefore, wholly fails to state a cause of action. (*Mayrant v. Richardson*, 1 Nott & McCord, (S. C.), 347; *State v. Burnham*, 9 N. H. 34; *Com. v. Clapp*, 4 Mass. 163; *O'Donaghue v. M'Govern*, 23 Wend. 26.

It is unnecessary to review the other errors at length, as they will probably be avoided on the next trial. We desire to say, however, that to support the cause of action in the first and second counts, the proof must show a charge of larceny. Proof of a less charge will not be sufficient.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other Judges concur.

W. W. JENNE, PLAINTIFF IN ERROR, v. P. M. GILBERT,
DEFENDANT IN ERROR.

[FILED MAY 16, 1889.]

1. **Trial: EVIDENCE: QUESTION FOR JURY.** J. being possessed of a stock of goods in Falls City, exchanged the same for the opera house in that place. The exchange took place March 22, 1886, to date from March 1 of that year. The receipts from sales of goods from March 1 to the time of exchange, were \$1,056, which the defendant testified he was to retain. *Held*, That this testimony should have been submitted to the jury, and that an instruction in effect withdrawing it from them was erroneous.
2. **Fraudulent Representations.** Instruction set out in the record does not fairly present the question of alleged fraudulent representations as to the value of certain goods.

ERROR to the district court for Richardson county.
Tried below before APPELGET, J.

Isham Reavis, and *A. E. Gantt*, for plaintiff in error, cited: *First National Bank v. Yocum*, 11 Neb. 328; *Slaughter's Administrator v. Gerson*, 13 Wall. 379; *Lord & Jenness v. Goddard*, 13 How. 198; *Taylor v. Leith*, 26 Ohio St. 428; *Veasey v. Doton*, 3 Allen, (Mass.,) 380; *Benjamin on Sales*, vol. 1, sec. 641.

E. W. Thomas, *Frank Martin*, and *C. Gillespie*, for defendant in error, cited: *Phillips v. Jones*, 12 Neb. 213; *Benjamin on Sales*, 560, note; *Jackson v. Collins*, 39 Mich. 557; 561; 3 Wait's Act. & Def. 431, 432; *Dillman v. Nadlehoffer*, 7 N. E. Rep. (Ill.) 88, and note citing many cases.

MAXWELL, J.

The defendant in error brought an action against the plaintiff in error, in the district court of Richardson county,

and on the trial recovered a verdict for \$2,157, upon which judgment was rendered.

For causes of action, the defendant in error (plaintiff below) alleges in his petition that "On the twenty-second day of March, 1886, plaintiff and defendant entered into a certain contract whereby plaintiff traded and conveyed to said defendant the opera house situated in Falls City, Nebraska, in exchange for a certain stock of goods then owned and possessed by defendant in said city, with the understanding and agreement and upon the condition that said contract and exchange should be considered as made, and should take effect, as of the first day of March, 1886; and that defendant should have the earnings and receipts from the opera house from said first day of March; and that plaintiff should have the earnings and receipts arising from sales made from said stock of goods from the first to the twenty-second days of March, 1886; and that defendant should pay to plaintiff the amount of such receipts which had come into his hands. The defendant did accordingly receive the earnings and receipts of the opera house from March first; but, disregarding his contract and agreement, having received and got into his possession the earnings and receipts arising from sales from said stock of goods from the first to the twenty-second days of March, 1886, amounting to the sum of one thousand and fifty-six dollars, he has wrongfully retained and appropriated the same to his own use; and although the plaintiff has demanded the same from him, he has refused and still refuses to pay the same or any part thereof to the plaintiff.

"2. When said contract was made between plaintiff and defendant, on March 22, 1886, as above set out, for the purpose of inducing plaintiff to enter into the same, and to convey said defendant the said opera house, as aforesaid, the defendant falsely and fraudulently represented to plaintiff that his said stock of goods was worth \$8,500, and would invoice nearer \$9,000 than \$8,000; that plaintiff

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had no knowledge of the value of said stock, as defendant well knew, and plaintiff relied upon said representation, and made said contract on the faith and credit thereof; that by said representation, plaintiff was induced to give said opera house in exchange for said stock; the said opera house was worth at least \$9,000, and the plaintiff had only a short time before, bought the same at that price; that the said stock of goods was really worth not more than \$3,500, as defendant then well knew; that said stock of goods would not have invoiced \$3,800; all of which facts were then and there well known to defendant, and the same were made for the purpose of inducing said plaintiff to make said trade, knowing that plaintiff would not enter said contract had he not believed said representations to be true. By said false representations, defendant defrauded plaintiff of the difference between the alleged value of said stock and its actual value, to wit, in the sum of \$4,700."

The plaintiff in error in his answer "Admits that he entered into a certain contract with plaintiff herein (defendant in error) on or about the 22d day of March, 1886, whereby the plaintiff in error (defendant below) traded a certain stock of goods to said plaintiff (defendant in error) for a certain building and ground in the city of Falls City, Richardson county, Nebraska, which building is known as the opera house; but defendant denies that the terms of the contract are as stated by plaintiff. Defendant avers the facts to be that during the months of January, February, and March, 1886, defendant was engaged in the general mercantile business in the city of Falls City, in company with Mrs. Emma Wicks, under the firm name and style of W. W. Jenne & Co.; that during the same time, said plaintiff was in said city in possession of a small remnant stock of general merchandise, which plaintiff had purchased from Watts & Aynes; that the said plaintiff was indebted on said remnant stock to the amount of \$1,600, and that at the request of said plaintiff, defendant went on a note with

said plaintiff for the sum of \$1,275, at the Richardson County Bank; that the plaintiff made frequent and numerous overtures to this defendant for a trade, and that finally defendant made a memorandum in writing as to what this defendant would do in regard to said trade; that the following is a copy of said memorandum: 'I will give you the W. W. Jenne & Co. stock as it was before the time of taking in the Watts & Aynes stock, for the opera house, and I will pay all bills up to March 1 and have all moneys taken in since. I will also pay bills \$275 out of money taken in since; the balance seven hundred and eighty-one dollars, you can pay me, so I can turn it over to Mrs. Wicks. I will also let you have the delivery wagon free, and I pay Mrs. Wicks her share of the interest in said firm; and I will work for you at \$75 per month for a year, unless I should sell the opera house in the mean time; then I would want to join you equally in the business. I will be the general manager of the business, and perform the duty to the best of my ability.

“W. W. JENNE.

“You have all the signs and signboards free, and everything pertaining to the signs;’ that said plaintiff at once accepted said proposition, and said trade was accordingly made, and said plaintiff entered into a written contract with defendant engaging the services of defendant for one year. A copy of said contract is as follows: ‘The contract made and entered into by and between P. M. Gilbert, of the first part, and W. W. Jenne, of the second part, all of Falls City, Nebraska. Party of the first part engages W. W. Jenne, party of the second part, to take charge and manage his business, consisting of the Banner Store stock — do the buying, paying bills, and managing business generally; and for said services, I, P. M. Gilbert, am to pay said Jenne \$900 for one year’s services, commencing March 1, 1886. Said Jenne is not allowed to draw over \$75 per month on above amount. Said Jenne agrees to perform

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his duty to the best of his ability, and use all his influence and experience in promoting the interest of said business. Signed this date.

“*March 1, 1886.*

P. M. GILBERT.

“*W. W. JENNE.*”

“This defendant denies ever making any false or fraudulent representations to said plaintiff concerning the value of the W. W. Jenne & Co. stock of goods, or in relation to any other matter, but avers that he believes that on the 1st of March, 1886, that the said W. W. Jenne & Co. stock would invoice \$8,000; that a partial invoice of said stock had been taken in February, 1886, and that defendant's belief is taken from that partial invoice, and his general knowledge of the business; that no complete invoice of stock was taken when said stock was traded to said plaintiff, nor was said stock completely invoiced until the first of February, 1887; that all of said stock and property was open and subject to the inspection of said plaintiff prior to and at the time he traded for the same, and was examined and inspected by him before he traded for the same; and defendant denies that he in any way misled said plaintiff, or that plaintiff relied upon any representations made by defendant.” Other facts are pleaded in the answer which need not be referred to here.

There is testimony tending to sustain the allegations of the petition, and also of the answer.

1. The court instructed the jury that “If the jury find from the evidence that on or about March 22, 1886, plaintiff and defendant entered into a contract whereby it was agreed that the plaintiff should give his opera house in exchange for defendant's stock of goods, and that said contract should take effect as of the 1st day of March, 1886, and if you further find that said opera house was accordingly conveyed by plaintiff to defendant, and said stock of goods transferred to plaintiff, then all the profits and proceeds arising from said stock of goods from and after the 1st

day of March, 1886, belong to the plaintiff; and if you find from the evidence that the defendant has kept and appropriated any part of the same, you should find for the plaintiff and assess his damages at the amount so appropriated, with interest at seven per cent from the time the same should have been paid over."

The testimony of the plaintiff in error is, that he was to have the proceeds of the sales from the 1st to the 22d of March, 1886. His testimony was entirely withdrawn from the jury by the instruction above given. In this we think the court erred. The case as made by the evidence must be submitted to the jury, and if the court withdraws material testimony from their consideration, it will be ground for the reversal of the case.

2. The court also instructed the jury that "If you find from the evidence that the defendant, for the purpose of inducing plaintiff to exchange his opera house for the Jenne stock of goods, made false and fraudulent representations as to the value of said stock, and as to what said stock would invoice, then, if you find that both of said parties had equal means of information, and were equally well qualified to judge of the value of said stock, then plaintiff cannot recover therefor.

"But if you find from the evidence that the defendant had better means of information on the subject of such representations, and was better qualified to judge thereof, and that plaintiff believed, and relied on such representations and made the trade on the credit thereof, then the defendant is responsible for the truth of such representations; and if you find that such representations were false, and fraudulently made, and that plaintiff was damaged thereby, you should find for plaintiff."

The testimony tends to show that after the defendant in error took possession of the stock of goods in question, the plaintiff in error remained in his employment as chief clerk and business manager for about eleven months; that

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during that time a son of the defendant in error acted as clerk and bookkeeper, and other members of the family of the defendant in error assisted in carrying on the store. During all this time no complaint was made against the plaintiff in error, nor that the defendant in error had not obtained all the goods that he bargained for. At the expiration of about eleven months, the plaintiff in error purchased an interest in the business and became partner with the defendant in error. There is some testimony as to the cause of the difficulty, which, as there must be a new trial, we do not care to repeat; but it was the duty of the court to submit this testimony to the jury in connection with the alleged fraudulent representations. The court also should have stated the difference between representations of actual value and mere expressions of opinion. The defendant in error had made a number of fruitless efforts to trade the opera house in question for goods prior to effecting the exchange in this case. And this, if we may judge from the testimony, he regarded as the best offer which he had received. The instruction in question does not submit the evidence fairly to the jury, and fails to state the law correctly.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other Judges concur.

98 464
48 237LOUIS LIBERMAN, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

[FILED MAY 16, 1889.]

1. **Constitutional Law: TRIAL WITHOUT JURY.** The provision of a city charter requiring the police judge of such city to hear prosecutions for violations thereof without a jury, is not in violation of the constitutional provision that "the right of trial by jury shall remain inviolate," such prosecutions being of a *quasi* criminal nature, and for acts which are not made crimes by the criminal laws of the state, or are made offenses only for the better protection of the health and peace of the municipality in the exercise of its police power.
2. **Municipal Corporations.** An ordinance prohibiting persons from engaging in certain kinds of business on the first day of the week, commonly called Sunday, is not void by reason of such discrimination; the prohibited business not being of public necessity.
3. ———: **SUNDAY OBSERVANCE.** Where an ordinance of the kind described excepts from its operation such persons as conscientiously *observe* the seventh day of the week as the Sabbath, the fact that an individual *believes* the seventh day is the Sabbath, but does not observe it as such, does not bring him within the exception.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Pound & Burr, for plaintiff in error, cited: *Slaughter v. People*, 2 Douglas, (Mich.,) 334, note; *Inhabitants of Saco v. Wentworth*, 37 Me. 165; *State v. Moss*, 2 Jones's Law (N. C.) 66; *Work v. State*, 2 Ohio St. 296; *Burns v. La Grange*, 17 Texas, 415; *Ex parte Siebenhauer*, 14 Nev. 365; Cooley, Constitutional Limitations, 390 to 397; Tiedeman's Limitation of Police Power, 184; *County of Amador v. Kennedy*, 11 Pac. Rep. 757; *Chicago v. Rumpff*, 45 Ill. 90.

G. M. Lambertson, for defendant in error, cited: *Tiedeman's Limitation of Police Power*, 187; *Ex parte Koser*, 60 Cal. 189; *The State, ex rel. Hahn, v. Hardy*, 7 Neb. 377; *Horr & Bemis's Municipal Police Code*, sec. 139; *City of Canton v. Nist*, 9 Ohio St. 440; *Johns v. State*, 78 Ind. 332; *Cincinnati v. Rice*, 15 Ohio, 225.

REESE, CH. J.

This was an application to the district court for a writ of habeas corpus, in which it was alleged that plaintiff in error was deprived of his liberty by P. H. Cooper, the marshal of the city of Lincoln. The writ was issued by order of the judge of the district court, to which the marshal made return that he held plaintiff in error by virtue of a writ of commitment issued by the police judge of the city of Lincoln, wherein it is shown that plaintiff in error had been convicted before said police judge of the offense of keeping open his "dry goods and notion store" for the sale of goods on Sunday, in the city of Lincoln, in violation of a city ordinance, and had failed and refused to pay the fine imposed by the said police judge.

Upon a hearing before the district court, plaintiff in error was refused a discharge, and was remanded to the custody of the marshal. He now prosecutes error to this court.

Two questions are presented for decision, which will be briefly noticed in the order in which they are presented by plaintiff in his brief:

First—It is stipulated, though not shown by the transcript of the police judge, that upon the trial of the case in the police court, plaintiff in error demanded a jury trial, which, under the provisions of section 106, chapter 11, of the Session Laws of 1887, entitled Cities of the First Class, was refused. It is now insisted that by the provisions of the Constitution, he was entitled to a jury trial, and that the law depriving him of that right is unconstitutional. The

ordinance under the provisions of which the conviction was had, provides as a penalty for its violation, a fine of not less than five dollars nor more than one hundred dollars, without imprisonment except upon failure of payment of the fine imposed. The section above referred to provides that prosecutions for a violation of city ordinances shall be tried by the police court without the intervention of a jury, and by section 98 of the same act, an appeal to the district court is permitted in all cases where the fine imposed exceeds ten dollars. It may be observed that the provision requiring prosecutions for violations of ordinances to be tried by the police judge alone, without a jury, has no reference to violations of the criminal laws of the state; for in such cases it is expressly provided that jury trials may be had.

We do not think that the law under which the police judge acted can be said to be unconstitutional, or that by the provisions of the constitution plaintiff in error had the right to demand a jury trial. Ordinances are made by virtue of the incidental powers of municipal corporations, under the authority conferred by legislative enactment, in the exercise of their legitimate police authority for the preservation of the peace, good order, safety and health, of the inhabitants of the corporation, and relate, generally, to minor acts not embraced in the public criminal laws of the state, and need not be tried by a jury, their speedy enforcement being usually necessary to accomplish the purpose of their enactment. They are not included within the provisions of the Constitution. (*City Council of Anderson v. O'Donnell*, 7 S. E. Rep. 523; *Carter v. Camden District Court*, 10 Atl. Rep. 108; *Dillon*, Mun. Corp., secs. 432-3; *Cooley's Const. Lim.* 596; *Sedgwick on Statutory and Const. Law*, 548-9; *Proffatt on Jury Trial*, sec. 95, and cases cited in note.)

Second—It is next contended that the city ordinance for the violation of which plaintiff was convicted, is uncon-

stitutional and void, for the reason that it extends to certain classes of individuals, privileges and business advantages over competitors and others engaged in business within the municipality. This contention is based upon the provisions of the ordinance by which certain kinds of business are exempted from its operation. The section of the ordinance under which plaintiff was convicted is as follows:

"Section 2. It shall be unlawful for any business house, bank, store, saloon, or any office, to be open, or for any person or persons to be admitted thereto for general business on said day within the limits of said city excepting only offices of physicians, telegraph offices, express offices, photograph galleries, railroad offices, telephone offices, hotels, restaurants, cigar stores, eating houses, ice cream parlors, fruit stands, or other like places of business in the sale of goods and commodities of a perishable character and for immediate use, street cars, railway passenger trains, livery stables, vendors of ice, bread, and milk, and drug stores for necessary purposes. Meat markets shall be permitted to be opened till the hour of nine o'clock A. M.; and bath rooms, and the printing of newspapers and distribution thereof, shall be open until the hour of twelve o'clock, noon. The term saloon as used in this ordinance shall be construed to include all places where malt, spirituous, or vinous liquors are sold or kept for sale as a beverage: And it is further provided, that all persons engaged in and about these occupations shall conduct the same in a quiet, orderly manner so as in no way or manner to interfere with or molest persons engaged in public worship at places of worship: *Provided*, That works of necessity and charity are excepted from the operation of this article: And *Provided further*, That nothing herein contained shall extend to those who conscientiously observe the seventh day of the week as the Sabbath, nor to prevent families emigrating, from traveling, superintendents or keepers of toll bridges or toll gates from attending and superintending the same, or ferrymen from

conveying travelers over the waters, or persons moving their families on such days, or to prevent railway companies from running necessary trains."

The stipulation of facts upon which the case was submitted to the district court contains the following paragraph:

"It is further agreed that the defendant is a member of the firm of Liberman & Berkson, and keep what is called "The Fair," on O street, between Ninth and Tenth streets in said city, and keep a general stock of ladies' and gentlemen's furnishing goods, notions, fancy goods, dry goods, soaps, combs, toilet boxes, canes, etc., etc.; that next adjoining said place of business on the west is W. J. Turner's drug store, who keeps a general stock of drugs, paints, oils, etc., and is a competitor of this defendant in the line of said goods called notions, fancy goods, soaps, combs, toilet boxes, cigar holders, tobacco boxes, etc.; that also within the said city are a great number of drug stores and cigar stands dealing in said articles called cigars, cigar holders, tobacco, tobacco boxes, canes, etc."

It is contended that by this ordinance, plaintiff in error is compelled to close his place of business on Sunday while the drug stores, tobacco houses, and others in competition with him in trade, are not required to do so. We apprehend that the ordinance under consideration must be given a reasonable construction, and that while a druggist is allowed to keep his place of business open "for necessary purposes," he would not be allowed to engage in the sale of soaps, canes, combs, toilet boxes, and cigar holders, without being held to have violated the provisions of the ordinance. While a drug store may be kept open for necessary purposes, yet it is not provided that the proprietor may engage in indiscriminate trade on Sunday, but, evidently, that he may sell such medicines, and only such, as are necessary to relieve the actual necessities of the public on that day. There is no discrimination in the ordinance against plaintiff's business, and it is not void.

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It is said in the stipulation that plaintiff in error and his partner "are Jews, and do conscientiously believe in the seventh day of the week as their religious day of rest; and upon said seventh day of the week, while said store, was open, they stood ready to sell any article in their store, as well as upon the first day of the week, and on said seventh day of the week they keep their store open the same as upon other days."

The ordinance provides that its provisions "shall not extend to those who conscientiously *observe* the seventh day of the week as the Sabbath," and, therefore, as plaintiff does not "observe" that day as a Sabbath, he is not within its provisions.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

WILLIAM H. REID, APPELLEE, V. LEONARD W. COLBY
ET AL., APPELLANTS.

[FILED MAY 16, 1889.]

1. **Fraud: FRAUDULENT REPRESENTATIONS: EVIDENCE.** The claim of defendants in the nature of a counter-claim for damages growing out of the alleged misrepresentations of the plaintiff at the time of the sale and transfer by him to them of the farm, and personal property thereon, as to the amount and value of such personal property, under the facts and circumstances set out at length in the opinion, as well as their claim for damages of a similar nature arising from their failure to obtain the immediate possession of said farm and personal property—being resisted by the family of the plaintiff, he being absent in the penitentiary: *Held*, Inadmissible, and rightly rejected by the trial court.
2. **Trial: EVIDENCE.** The claim of defendants that in the execu-

tion of the note and mortgage, sued on by C. and H., to R., there was a mistake whereby said note and mortgage were drafted, made, and executed, so as to read and represent a sum one thousand dollars too much, and in excess of the sum actually agreed upon and intended, *held*, to be supported by the overwhelming weight of evidence, and that the finding of the trial court against such claim is clearly wrong.

3. **Verdict.** Where a verdict or finding is clearly wrong, it should be set aside. (*Seymour v. Street*, 5 Neb. 85.)

APPEAL from the district court of Gage county. Heard below before BROADY, J.

Harwood, Ames & Kelly, Pemberton & Bush, and *C. O. Bates*, for appellant, cited: 3 Suth. on Dam. 587, and cases cited in note; *Phillips v. Jones*, 12 Neb. 213, 215; *Munroe v. Prichett*, 50 Am. Dec. 203; *Chatam Furnace Co. v. Moffatt*, 18 N.E. Rep. (Mass.) 169; *Cooper v. Schlesinger*, 111 U.S. 148; *Bower v. Fenn*, 90 Pa. St. 359.

A. Hardy, and *A. H. Babcock*, for appellee, cited: *Babcock v. Libbey*, 53 How. Pr. (N.Y.) 255; *Starr v. Bennett*, 5 Hill, (Id.) 303-306; *White v. Seaver*, 25 Barb. (Id.) 242; *Sawyer v. Prickett*, 19 Wall. 146.

COBB, J.

The plaintiff commenced his action in the district court of Gage county for the foreclosure of a real estate mortgage executed by L. W. Colby and Alfred Hazlett, together with their wives, to secure the payment of a promissory note executed by them to him for the sum of \$12,000, with interest at ten per cent per annum, dated March 7, 1884, and payable March 7, 1885.

The plaintiff's petition, after setting forth the execution and delivery of the note and the execution, acknowledgment, delivery, and recording, of the mortgage, contained the statement that, "The defendants have not paid the

amount secured by the said mortgage, except the sum of \$40 on March 24, 1884, and the sum of \$1,791.15, April 9, 1884, and the further sum of \$460 April 17, 1884; and there now remains due and unpaid thereon the sum of \$13,564.47." (February 4, 1888.)

The defendants by their joint answer alleged as follows:

I. They admit that on March 7, 1884, the defendants L. W. Colby and Alfred Hazlett, made and delivered to the plaintiff their promissory note, as set out in plaintiff's petition, and that to secure the payment of the note, they, with the defendants Clara B. Colby and Libbie Hazlett, on the same day executed and delivered to the plaintiffs the mortgage deed in the plaintiff's petition described, which was duly recorded in the county clerk's office; that they have paid on said note, sums amounting to \$2,291.15; that on or about March 15, 1884, said defendants, L. W. Colby, and Clara his wife, and Alfred Hazlett, and Libbie his wife, executed and delivered to the defendant William H. Kilpatrick, a warranty deed to the mortgaged premises, and that on January 15, 1885, the said Kilpatrick executed and delivered to the said Colby, a warranty deed to the mortgaged premises; and they deny each and every allegation in said petition except the matters and things expressly admitted.

II. That on March 7, 1884, at the time of the execution of the mortgage set forth in the plaintiff's petition, the plaintiff, William H. Reid, was indebted to the defendants L. W. Colby and Alfred Hazlett, in the sum of \$5,000 for professional services and legal expenses in the prosecution of the State of Nebraska v. William H. Reid; that for the purpose of liquidating said indebtedness, and inducing the defendants Colby & Hazlett and William H. Kilpatrick to purchase said mortgaged premises, and a large amount of personal property in connection therewith, and to induce the defendant William H. Kilpatrick to advance money sufficient to pay the indebtedness

to Colby & Hazlett, and to pay other accounts of costs and indebtedness to other parties then required to be paid by the plaintiff, he represented and made the following statements in regard to the premises and personal property:

That he was the owner in fee of the mortgaged premises; that the same were free and clear of all liens and incumbrances; and that the same was in his possession; and that he had lawful authority to sell and convey the same, and deliver possession thereof; and that it was of the value of \$14,000; and that he was the owner and was in possession of a large amount of personal property on said premises and had good right and lawful authority to sell the same, to wit: ten head of horses, twenty head of cows, thirty three-year-old steers, twenty two-year-old cattle, twelve yearling calves, sixty head of hogs, three lumber wagons, one spring wagon, two thousand bushels of corn in crib and field, three sets of double harness, one harvester, one corn planter, two harrows, one hay rake, three plows, one stove, one table and five chairs, and a large amount of household property, cooking utensils, and other personal property, of the value of \$4,000. Whereas in fact the plaintiff was not the owner, nor was he in possession of said property, nor was it of the value of \$4,000; that said plaintiff was the owner and in possession of only the following property, of the value not exceeding \$1,000, to wit, ten hogs, ten cows, four horses, twelve two-year-olds, ten yearlings, two calves, one spring wagon, three plows, two sets of harness, one table, five chairs, one cook stove, six hundred bushels of corn; and said mortgaged premises were not in the plaintiff's possession, but were in the possession and control of James M. Reid, George Reid, William Reid, Sarah Plucknett, and others, who had liens upon and claimed to own and control the same; and there was also a large amount of taxes due, and a lien upon said premises, all of which the plaintiff well knew, and of which the defendants

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had no knowledge whatsoever; that relying entirely upon said representations, and without having seen said property, the defendant agreed with the plaintiff as follows: To purchase said mortgaged premises and personal property so represented to be owned by plaintiff, at the sum of \$16,000, the same to be conveyed to the defendants Colby & Hazlett and by them conveyed to the defendant William H. Kilpatrick, the compensation thereof to be as follows: \$5,000 in attorneys' fees and expenses in full of the indebtedness of the plaintiff to Colby & Hazlett, and the balance of the \$11,000 was to be placed in the shape of a note secured by a mortgage on said premises, due in one year. And it was also agreed that the further sum or sums amounting to \$2,291.15 for costs, and other indebtedness of the plaintiff, should be paid from time to time as required, and the amount when so paid endorsed on the note of \$11,000; that pursuant to said agreement, the plaintiff executed and delivered to the defendants, Colby & Hazlett, a warranty deed of said mortgaged premises, and the said defendants executed and delivered to William H. Kilpatrick their warranty deed of said premises, and a bill of sale of said personal property, and said W. H. Kilpatrick paid to Colby & Hazlett the sum of \$4,000, and for costs and other indebtedness of the plaintiff, amounts aggregating \$2,291.15, which were indorsed on the notes set forth in plaintiff's petition; that said Colby & Hazlett receipted said \$5,000 indebtedness in full, and by a mistake in figuring executed and delivered the said note and mortgage described in plaintiffs' petition for \$12,000, when the same should have been for \$11,000, in accordance with the terms of said agreement; and after the execution and delivery of all the papers connected therewith, the defendants discovered said mistake in said note; and that thereafter the defendants learned for the first time that the plaintiff was not the owner and in possession of the said personal property and mortgaged premises purchased, and that the representations in regard thereto were

false; that the said James M. Reid and others were in possession of said personal property and premises under a lease and claim of ownership from the plaintiff, and on the 24th day of March, 1884, he brought suit in the district court against the defendant W. H. Kilpatrick, and others, and obtained an order enjoining and restraining said defendant from interfering with his possession and ownership in any way; that the defendant Kilpatrick brought an action in replevin in said district court against the said J. M. Reid and others, to recover the possession of the said personal property, but was unable to obtain but a small portion thereof; that afterwards by the consent of the plaintiff the matters in difference between James M. Reid and the plaintiff, and these defendants, were compromised and settled, whereby the said premises were left in the occupancy and possession of James M. Reid and the plaintiff's other children for the period of two years, whereby the defendants lost in the use and rents thereof, to the defendants' damage of the amount of \$2,000, but the personal property received by and turned over to the defendants by plaintiff amounted in value only to the sum of \$1,000, and was \$3,000 less than that represented by the plaintiff as aforesaid; that the defendants necessarily expended large sums of money in costs and litigation in endeavoring to recover possession, and were put to great trouble, expense, and loss of time, in that behalf, to their damage in the sum of \$1,500; that they paid the taxes on said premises for the years 1883 and 1884, amounting to the sum of \$150, which were a lien upon said mortgaged premises, and which should have been paid by said plaintiff; that by reason thereof the defendants have been damaged and are entitled to recover of the plaintiff the sum of \$6,650, which, with the mistake on said note and mortgage of \$1,000, amounting to \$7,650, the defendants are entitled to have deducted from and set off against the mortgage, note, and debt, sued upon in the plaintiff's petition; that the defendants have

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requested the plaintiff at various times to make such deduction, which he has failed and refused to do; that the defendants have been ready and willing, ever since the maturity of said note to pay the amount after deducting the amount of the mistake and damages by reason of false representations of the plaintiff, and failure to comply with his agreement, and defendants offer to pay the same into court, and have held the same ever since subject to the order of the plaintiffs. The defendants say that the deed made by W. H. Kilpatrick to L. W. Colby, was made as a matter of convenience, by agreement with the defendant, and by reason of the damages growing out of the false representations of the plaintiff, and his failure to comply with his agreement which said Colby was interested for and liable equally with other defendants; with prayer that the said sum of \$7,650 be deducted from the face of the note sued on, from date, and that the defendants be required to pay only the sum of \$4,350, without interest, from the maturity of the note, in full satisfaction of said debt and for costs.

The plaintiff made reply denying each and every averment of new matter set up, and alleging that on March 7, 1884, the plaintiff and the defendants Colby & Hazlett accounted together and fully settled all matters concerning the legal services of said Colby & Hazlett and their expenses in the matter of the State of Nebraska v. William H. Reid, the plaintiff, and settled and assumed that the plaintiff should pay the defendants Colby & Hazlett the sum of \$4,000, in full satisfaction of the same, and that said defendants then purchased of the plaintiff the farm and premises described in the petition, at the sum of \$14,000, and the personal property thereon at the value of \$2,000, and made payment therefor by giving the plaintiff the note and mortgage mentioned, and in this way they agreed to and did deduct \$4,000 from the purchase price of said property, and only paid the plaintiff therefor the

sum of \$12,000 by giving a note and mortgage; and the plaintiff alleges that in consideration of the premises aforesaid, the defendants Colby & Hazlett agreed to get the plaintiff out of the state penitentiary of Nebraska within one year from March 7, 1884, which they wholly failed to do.

There was a trial to the court, with findings for the plaintiff and a judgment and decree of foreclosure in his favor for the sum of \$13,896.84, from which the defendants bring the cause to this court by appeal.

It appears from the bill of exceptions, as well as by the criminal annals of Gage county, that sometime in the summer of 1882, the plaintiff, William H. Reid, was arrested on his farm in that county charged with the crime of murder, by administering poison to his wife, and was brought to trial therefor. At the first trial the jury failed to agree. In the second, he was convicted of a lesser degree of homicide, not shown by the bill of exceptions in this case, nor now accurately remembered. The plea and defense upon which he escaped the extreme penalty, was that of insanity. He was defended by the law firm of Colby & Hazlett, who not only defended him on his trial, but attended as attorneys to the preparation of his defense, procuring expert testimony in his behalf, and doubtless rendered him all the aid and assistance possible as friends as well as legal advisers. It also appears that during the time of his incarceration, Reid furnished them for the various purposes of his defense the sum of \$800 in money.

It appears at the time of his arrest and commitment to jail, that he left in his house, on his farm, his six children, whom, in his deposition, he states to have been from six to nineteen or twenty years of age. He also had a brother-in-law, Bailey, who, with his family, resided in the vicinity of Reid's farm. There is but little testimony as to what care was taken of the house and farm of Reid during the nineteen months of his incarceration in the county jail, nor by

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whom; but for aught that appears, the children remained there. It does appear from Reid's testimony that some short time before his second trial, at the close of his confinement in jail, he made a lease of the farm to his brother-in-law, Bailey, but that upon the lessee's attempting to enter into possession, he was resisted by the children of Reid, then occupying the house, and did not obtain possession, but in consequence of the opposition of Reid's sons, he relinquished it; that Colby & Hazlett, attorneys, drew up the lease from Reid to Bailey, and were cognizant of the circumstances, and of these facts.

It appears that upon the rendition of the verdict against Reid, which acquitted him of the crime of murder under the plea of insanity, his children conceived the idea of having him placed under guardianship to prevent any injudicious transfer of his property. This design of the children coming to the knowledge of Colby & Hazlett, they went to him in the jail in the evening, for the purpose of obtaining such a transfer of his property as would secure them their fees for legal services in defending him, and for money expended in his defense. It is probable, though not wholly certain, that Colby & Hazlett had previously obtained a promise more or less definite from the Kilpatrick brothers that they would purchase the Reid farm and personal property thereon.

The Kilpatricks were then absent from Gage county, one at Omaha and the other at Chicago. On the evening in question, Hazlett, for the firm of Colby & Hazlett, opened oral communication with J. D. Kilpatrick, at Omaha, by telephone.

According to Reid's testimony, he understood that the communications between Hazlett and Kilpatrick by telephone that evening were confined to the subject of advancing money by Kilpatrick to Colby & Hazlett, to enable them to take the property, and did not extend to the purchase of the property by the Kilpatricks. On the contrary,

it would seem from the testimony of Colby and Bates, as well as that of Hazlett himself, that it did comprehend the purchase of the property ultimately by the Kilpatricks; and that the deed from Reid to Colby & Hazlett, and the mortgage from them back to Reid, was solely in consequence of the absence of the Kilpatricks from Beatrice, and the necessity for an immediate transfer of the property before notice of the proceedings on the part of Reid's children should be served on him; and that the title to the land and property was taken by Colby & Hazlett really in trust for the Kilpatricks. This view of the case is deemed important by the defendants for the reason that if it be true, it lends some force to their contention that the trade was made on the part of the purchasers of the property solely on the representations of Reid as to the amount and value of the personal property in the sale, as well as the situation and condition of the farm in respect to its occupancy, it being conceded that the Kilpatricks were without other information or knowledge of the property and of its value and condition. I do not, however, attach great importance to it. For, in view of all the circumstances, I think that whatever view may be taken, whether Colby & Hazlett bought the property, themselves, with or without the intention or expectation of turning the same over to the Kilpatricks, upon terms more or less understood or subject to future negotiations, the defendants in this case are chargeable with all the knowledge or notice that Colby & Hazlett, or either of them, possessed, of the situation or value of the property which was the subject of the sale. They knew that Reid had been forcibly taken away from his farm and property nearly two years before, and during all that time had been imprisoned, and that all or nearly all of his communications with the world had been received through them. They knew far better than he whether the stock and other property left upon the farm at the time of his arrest had been preserved and kept intact;

what increase, if any, had occurred ; and generally, its situation and condition. There appears, in the bill of exceptions, a list of this property ; and there is some evidence that it was made at the dictation of Reid, there, that night. But this testimony is far from conclusive ; and even if true, such a list, at that time, and under the circumstances, must have been understood by them as accompanied by all the qualifications and exceptions connected with the situation. All agree that the estimated value of the farm was \$14,000, and whatever value may have been put upon the personal property by Reid, or whatever number of steers may have been represented by him to be on the place, or whatever quantity of corn may have been there, no one claims that the united value of the farm and the personalty was fixed at a greater sum than \$16,000, thus fixing the value of the personal property at \$2,000. No witness has fixed the value of the personal property actually received by defendants at less than that sum. It seems that after the property was transferred by Colby & Hazlett to Kilpatrick, Reid's children disputed his right to take possession of it, and he sued out a writ of replevin and replevied the same from them ; and the several appraisers in this action fixed the value of the personal property at \$3,544 ; and while defendants, in their testimony, make it pretty clear that they failed to obtain possession of nearly all the property which Reid represented to be on the place at the time of the sale, or that they had reason to believe was on the place at the time of the sale, yet no witness testifies that the personal property actually reduced to possession by defendants was of less value than \$2,000. That was all that Reid realized for it in the transaction ; and unless it is believed that under the circumstances the defendants had a right to rely upon the knowledge or judgment of Reid as to the amount and value and kind of property remaining on the farm during his enforced absence of nearly two years, and shut their eyes to their own knowledge of the same facts

and circumstances with their vastly superior means of information and judgment, defendants cannot be permitted to profit by any mistake, misinformation, or error of judgment, on the part of the plaintiff.

I come to the conclusion, therefore, that defendants can take nothing by this second defense and counter-claim, which, as they express it in the brief, is that there was not the amount of personal property on the farm represented to be at the time of the sale by at least the value of \$2,000. Before passing upon this branch of the case, I will call attention to the fact that the bill of exceptions contains a copy of the deed or bill of sale from William H. Reid to L. W. Colby and Alfred Hazlett, dated March 7, 1884, acknowledged before Charles O. Bates, notary public, whereby for the express consideration of \$2,000 the said Reid grants, bargains, and sells, to said Colby & Hazlett the identical personal property hereinbefore mentioned by the following description, to wit: ten head of horses; about fifty or sixty head of cows, calves, and steers, and all my personal property of every description, consisting of stock, wagons, buggies, agricultural implements, household furniture, harness, cattle, horses, hogs, and other personal property of every description, kind, and nature, on the farm formerly owned by me, and so forth. And this indefinite and duplex description of his personal property was probably the only one which he would undertake to give, or which the defendants considered it worth while to take at the time. By this description in his deed or bill of sale, he warranted to defend the sale of said property and goods and chattels, and by that description alone do I think him legally bound.

The taxes on the farm for 1883 were a lien upon the same at the date of the deed from Reid to Colby & Hazlett, and being an incumbrance warranted against by the deed, and having been redeemed by defendant Kilpatrick by the payment in redemption thereof of \$44.03, on

the 4th day of February, 1885, defendants are entitled to that sum to be credited as of that date upon the note and mortgage described in the petition.

Defendants also claim an allowance for the taxes of 1884; but the conveyance having been made prior to April 1 of that year, the same were not a lien upon the land while owned by the plaintiff. The statute (sec. 138, chap. 77, Comp. Stat.) providing that "The taxes assessed on real property shall be a lien thereon from and including the first day of April in the year in which they are levied until the same are paid," their claim for these taxes cannot be allowed.

As to the damages claimed by defendants on account of not being able to obtain possession of the farm without expense, delay, and trouble, it will be sufficient to say that it is deemed to be inadmissible. Reid warranted the title in and to the real estate to them. Any damages to them legally arising from a breach of the covenants of the deed would no doubt form the ground of a counter-claim, or set-off, as in the case of the taxes referred to. And it may be admitted as a general proposition that it is the duty of the vendor of land to place his vendee in possession; but in this case it was not demanded nor expected of Reid, and defendants contracted with him and accepted of their conveyance from a vendor whom they knew to be utterly without power to go out upon his own land, or to put his vendee in possession.

This brings us to the consideration of the first point discussed by counsel in the brief: the claim of defendants, as set up in their answer, that in the drafting of the note and the mortgage by Colby & Hazlett to the plaintiff, by mistake and error of the draftsman, the sums were made for \$1,000 more than should have been, and more than intended to be.

It is assumed by counsel on either side, in the briefs, that this claim was disallowed by the trial court on finding the

amount due to the plaintiff on the note and mortgage, and in its rendition of judgment thereon. If upon the presentation of this question to the trial court there was a mere conflict of testimony, then it must be admitted that under the law (as often announced by this as well as other courts) the findings of the court below, unless clearly wrong, will not be disturbed. And it may also be admitted that our examination of the bill of exceptions shows that the weight of testimony is largely in favor of the claim of the defendants that there was a mistake of \$1,000 in the amount as drafted in the note and recited in the mortgage. The defendant L. W. Colby, in his examination as a witness, stated that "We had a meeting with Reid for a settlement, and I had Mr. Bates make out a statement of the account between us for costs and expenses, and money advanced, and it amounted to something over \$5,000, the balance due after giving him credit for money he had paid; he paid some money; he had advanced and paid us \$150 at one time, and \$500, making \$800 in all. Our account at that time, against him, amounted to \$6,134.30, and after deducting the \$800 balance, the account amounted to \$5,334.30. * * * There was no thought of Colby & Hazlett buying it. The only thing they were to have was \$5,000, their fees and costs advanced." * * *

The witness further stated that the Kilpatricks were to take the property of Reid; that they were to advance the money coming to Colby & Hazlett then, the balance to be secured on the land; but they not being present, and in consequence of the proceedings of Reid's children, it was necessary that the conveyance be made to Colby & Hazlett as formerly stated.

"He [Kilpatrick] wanted to know how much money was needed—wanted to know if we couldn't take less than \$5,000 in cash, and have the balance on time. Hazlett, I think, did the telephoning, although I did some of it. Hazlett says: 'I think we can get along with \$4,000 cash,

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and you can pay the costs as you have to pay them.' Then we talked with Reid again, and the arrangement was then made, as Kilpatrick was not there, to give a mortgage back on the premises. It should be deeded to Colby & Hazlett, and the personal property assigned to Colby & Hazlett, the whole business for \$16,000; and Colby & Hazlett should on the return of the Kilpatricks turn it all over to them on the same terms. In other words, Colby & Hazlett were the *go-betweens*. We didn't purchase the property, and didn't claim to. Our only interest was the \$4,000 cash coming to us; so we then made that arrangement; and I had some other business, or something of the kind, and Hazlett and Bates fixed up the papers. I think Bates fixed up the papers, and, in some way or other, instead of making the mortgage for \$11,000, after taking out our \$5,000, the mortgage was given W. H. Reid for \$12,000; and I presume that mistake was made by making the \$1,000 difference by cash, by telephone. We fixed out the papers that night. I think the bill of sale was made by Reid in blank that night, and I think the deeds were made and filled out, and I signed, and my wife, and Hazlett, and mortgaged the thing for \$12,000, when it should have been for \$11,000; and I gave it to Reid, and we filed the papers. I think we gave it to the clerk that night, and the notice of guardianship was served on Reid the next morning. I didn't discover the discrepancy in the mortgage until quite a number of days afterwards; then we couldn't explain it. When we came to fix up with the Kilpatricks, they paid us over the \$4,000, and we took Kilpatricks for our share of the fees, and gave him a receipt in full. * * * This is the receipt that was given Reid that night, on the date that it bears:

“BEATRICE, NEB., March 7, 1884.

“Received of William H. Reid the sum of \$5,000, in full satisfaction and payment of all claims and damages against him for legal services and expenses up to date in the case

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of State of Nebraska v. W. H. Reid, and in full of all fees for services hereinafter rendered by us in and about said case. [Signed] L. W. COLBY,

“ALFRED HAZLETT.

“*Of and composing the firm of Colby & Hazlett.*”

“We took Kilpatrick for \$5,000, and by a mistake the mortgage was made for \$12,000 instead of \$11,000, which it should have been. I took the papers, and being in a hurry, for we didn't want a guardian appointed over this land before we got our money out of it, we only received \$4,000. We have never since received the other, and the \$1,000 which we should have received, and which it is agreed we should receive—with Reid—was included in the \$12,000-note in this case, which should have been for \$11,000. I will state this: we presented our bill to Reid, an itemized statement of all expenses; it was all agreed to, and no objection made to it; and Reid expressed himself perfectly satisfied with the amount, and with our services in the matter, too.”

On cross-examination, the witness testified as follows:

Q. State in whose handwriting that receipt is?

A. The body is mine, and the signatures are Hazlett's and mine.

Q. That was the paper you gave Reid at that time?

A. Yes.

Q. It is not signed by him?

A. No.

Q. It was prepared where?

A. Right there in the jail.

Q. This business was done in the jail in the night?

A. Yes.

Q. You were present when your wife signed?

A. I don't remember whether I was or not. I think I took the deed down there and got her to sign it myself—the mortgage. I think she didn't read it over. She always signs whatever I want her to.

Q. You told her it was all right?

A. I did; I never read it over, to my knowledge.

Q. Do you mean to say that, lawyer as you are, you signed a mortgage that you even supposed was for \$11,000, without reading it?

A. I have no doubt of it. It was prepared by Bates, and I am always willing to sign anything he gets up, even with my eyes open.

Q. You don't know whether you read it or not?

A. I know very well I didn't read it at all. If I did, it would be an unusual thing for me.

Q. Is it not true that you had a settlement of the matter between you and Reid?

A. Yes.

Q. Of how many did the firm of Colby & Hazlett consist, when you made that settlement? How many of you were there?

A. I think I went to the depot and got into conversation with Sarah Bailey and her husband. I think I was there a portion of the time, and a portion was not. I don't think I was there when the papers were drawn up.

Q. Was Hazlett there?

A. I think he was, and Bates.

Q. Bates was a member of the firm?

A. I cannot recollect. He was there, a member or employé of the firm. I cannot remember now whether he was a member, at that time, or not.

Q. You had just defended Reid in a state case, and your defense was insanity or feeble mind?

A. Insanity, and not feeble minded in matters of business.

Q. You mean to say that an insane man, like Reid, beat all three of the members of Colby & Hazlett in the settlement that night?

A. No; I think it was a mistake. He may have seen it, and he may not; although he is a quick, business man—few better, that I ever met.

Q. In whose handwriting is the note and mortgage?

A. In Mr. Bates's.

Q. And they are both signed by you and Alfred Hazlett?

A. Yes, and our wives.

Q. Now then, the note and mortgage written at \$12,000 passed through the hands of Mr. Bates, and through yours and Mr. Hazlett's hands without either of you discovering there was a mistake of \$1,000 in writing it?

A. Yes.

Q. And Bates knew that the mortgage should have been written for \$11,000 and drew it for \$12,000?

A. I don't know whether he knew that or not. I would state that the mistake came from telephoning to Kilpatrick, in which he asked if \$4,000 would not do instead of \$5,000. * * *

Q. Did you have any talk with Hazlett and Bates, immediately after the execution of these papers, about the mistake?

A. I did.

Q. I only want to get you to point out the time.

A. I cannot tell the time.

Q. Was it before or after your deed to Kilpatrick?

A. I think it was before and at the time. I think we talked it over two or three times.

Q. So on the 19th of March you knew all about the mistake?

A. The 19th day of March?

Q. Yes.

A. Well, I undoubtedly did long before that.

Q. Say in whose handwriting this letter is?

A. In mine.

[The plaintiff's attorney here offered in evidence a letter of the witness to the plaintiff, identified as exhibit "E."]

By the witness: Yes; I think I sent that letter.

Exhibit "E" is a letter dated Wymore, Neb., March 19,

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1884, addressed to William H. Reid, Esq., Lincoln, Neb., and signed L. W. Colby. It opens as a social and friendly communication, but soon passes to an account of the difficulties encountered by the Kilpatricks, to whom they had sold the real and personal property, in their endeavor to obtain possession of it, as the boys had run off part of it; that James Reid had brought an injunction suit against Colby & Hazlett, claiming to be the heir at law of his father, who was unable to transact business by reason of *insanity*, and so forth; of the writer's unsuccessful attempts to make the proper arrangements with the minor children; that the county commissioners had refused the allowance of fees and mileage of Iowa witnesses at the recent trial, which helped Reid considerably; and asking his authority to settle up the fees taxed against him in the recent trial, if it could be done for \$1,700, inclosing a blank warrant for such authority and settlement; informing him that the Baileys were still on the place, but that he was making arrangements to move them to town soon; stating that the writer was in Lincoln the last week, but was too busy to get out to the prison to see Reid, and that he might be up again soon, and expressing the wish that Reid would write him fully, giving his ideas, suggestions, and desires, and expressing his own belief that things would work out right in a short time, and closing with the expression that "we will do our part." * * *

By the court: Did you call Reid's attention to the mistake of \$1,000?

A. Yes.

Q. When?

A. I don't remember the exact dates. I talked with him a number of times.

Q. State the times as near as you can?

A. I think at the time I went up there. * * * I spent a day up there at which I talked the whole business over with him. It was probably along in March.

Q. Before or after the letter of the 19th?

A. It was after that undoubtedly.

Q. When was Reid taken to the penitentiary?

A. I cannot state, but I should think about the 8th or 9th of March. I think these papers were served on him before.

Q. How long after the papers dated March 7th?

A. The next day.

Q. And he has been in the penitentiary ever since?

A. Yes.

Q. What did he say about the mistake?

A. He said he didn't know, "do you think so?" I told him there was no question about it. "Well," he says, "we have got to get money matters paid up, and we will see about it," in an indefinite sort of a way. He never admitted it was a mistake.

Q. Did you deed to Kilpatricks on the 19th of March?

A. I think the 14th or 15th.

Q. Was there anything said to them about the mistake?

A. There was talk about it at the time; talk between Hazlett, Bates, myself, and Kilpatricks. Of course we could not get our \$1,000 out of them.

Q. Did that deed make any reference to the mortgage?

A. Yes; the deed recited about the \$12,000 business. In other words, we turned it over just as we received it.

The witness having left the stand, was recalled, and made a further statement in reference to his present interest in the property; after which he was cross-examined by counsel for plaintiff as follows:

Q. Why didn't you say something about the \$1,000 in your letter?

A. The reason was that I had talked that portion of it over before with him, and I was particular to state rather fully in all my letters to Mr. Reid, because he had a habit of forgetting all I had said before.

Q. Why didn't you say something to him in the letter wrote him on the 19th of March, 1884, about the \$1,000?

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A. I don't remember why I didn't. I might not have told him a good many things.

C. O. Bates, a witness for the defendants, testified that he was present on the night of March 7, 1884; that he drew up some papers there, fixing up some debts, mortgages, and so on, between the parties. After stating the efforts made by himself, on the part of Colby & Hazlett, to assist Reid in raising money to pay their fees and expenses incurred in his defense, by mortgaging his farm, or in some other way, he further stated that "We told Reid we would see if Kilpatrick could not take the place; and the question of the value was discussed, and he valued it at \$35 or \$40 per acre; I think \$40 at first, but finally agreed to take \$35. He said there was a lot of personal property on the place that he owned at that time; he gave us a list of the personal property that night, at the jail, and it was taken down there. The list that Mr. Colby has read here, is the list that he gave us, and claimed that it was worth \$4,000; but he would take \$2,000. I had not talked before of the arrangement with either of the Kilpatricks, although I heard one side of the telephone conversation between Hazlett and J. D. Kilpatrick, who was then at Omaha; but we didn't know which one of the Kilpatricks would buy it. He objected to paying as much money down as we wanted, and I heard Hazlett say at the telephone that \$4,000 would do. Of course I don't know what the other side of the conversation was. That was the day before, if I recollect right—the day before the evening we were at the jail. Colby & Hazlett had several conversations with him, I suppose, but I did not hear them; but finally, that evening, when the papers were fixed up, we drew a bill of sale of the personal property, a deed from William H. Reid to Colby & Hazlett, and a mortgage from Colby & Hazlett back for \$12,000. These were all signed, and I acknowledged them there." That witness had the itemized statement of the bill of Colby

& Hazlett there at that time ; it was put down there that evening and figured up, amounting to \$6,134.30, as rendered to Reid. The witness says: "I will state here that this included our attorneys' fees, our money we had paid out for various causes in the defense of the case. Reid looked it over and the amount was satisfactory to him, and it was agreed upon that that was the amount. He had paid us \$800 at different times, leaving a balance due of \$5,334.30 owing by W. H. Reid to Colby & Hazlett, and it was settled by his agreeing to pay \$5,000. It was taken in round numbers at \$5,000. At that time the understanding between us was that Kilpatrick's were to take the place and pay the \$5,000, and give a mortgage back for the balance. I don't know and cannot tell, myself, now, how that mortgage was ever made for \$12,000. I drew up the mortgage as I have testified, and it was signed ; but it was undoubtedly—and there are indications that it was—an error, because the talk and agreement between us was that we were to have \$5,000 in cash, in full of our bill, and the mortgage given back on the place should have been only for \$11,000. How it was made for \$12,000 I don't know, now ; I know this, further, that in my conversation with Mr. Reid before the signing, and at the time, that \$11,000 was talked of."

After the witness had continued his testimony upon the other branch of the case, at considerable length, his examination proceeded as follows :

Q. Do you remember when the first talk was after the discovery of the mistake in the mortgage?

A. I do not ; but it was not a very long time. My recollection is that it was after the transfer was made ; but would not be sure about that. I know I began to look around for the other \$1,000 ; that is the first I had noticed the deed, and I think you (Colby & Hazlett) went down to ask the Kilpatrick's about it at the time ; but it could not have been long either before or after the transfer was made.

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I know as soon as they came home they paid us the \$4,000, but when the error was finally discovered I don't know, now. I know I immediately called Colby's attention to it, and Colby thought that Reid would fix it up as soon as he discovered it.

By the court: When were the note and mortgage delivered to Reid?

A. That night, March 7, right in the jail. I think Colby took it out, and he and his wife signed it, and I went with him, and Hazlett the same.

Q. When was it recorded?

A. The next day, the 8th.

Cross-examined by Mr. Hardy:

Q. Who got Reid's mortgage recorded?

A. I cannot tell.

Q. Who did he give it to that night?

A. I cannot tell; my recollection is that he gave it to me, but would not be positive.

Q. You knew that you drew the note and mortgage for \$12,000, didn't you?

A. I suppose I must have known it.

Q. You knew it all the time, and all the way along, and you don't think, now, that it occurred to you there was a mistake made, until after you had deeded to Kilpatrick?

A. I think this —

Q. Do you think that?

A. I will answer in my own way: I think the change of that amount we were to be paid, at that time, from \$5,000 to \$4,000.—I think in figuring in the jail that the change of that amount we were to be paid, in cash, from five to four thousand dollars—I think, in figuring, and I have no doubt of it.

Q. You are not apt to forget small sums of one thousand dollars when they are coming to you?

A. Not usually.

Q. That is the first time it ever occurred to the firm of Colby & Hazlett?

A. I cannot state whether it is or not.

Q. Can you name any other case where it occurred?

A. Not now, no.

Q. Now, Mr. Bates, you say you knew—

A. I desire to say this, Mr. Hardy,—

Q. Answer my question. You say that the note and mortgage were drawn for \$12,000, and you knew it; now tell me why it is if you knew it that you didn't discover there was a mistake until after Colby & Hazlett had deeded to Kilpatrick; or is that true?

A. I didn't fix the time when I discovered it. I don't remember; the night these papers were drawn up, it was quite late before it was finished; we were in a great hurry, because we were afraid matters would be tangled up. * *

Q. Now you settled with Reid that night?

A. We agreed on the amount due us, yes.

Q. And is it not true you compromised the matter at \$4,000?

A. No, sir.

Q. Is it not true that the members of your firm have stated in town that the amount of \$4,000 you agreed to take and receipt for?

A. If he has stated it he is mistaken.

Q. He was interested and was there; Hazlett was interested and was there?

A. Part of the time.

Q. And you were there part of the time?

A. I was there all that time.

Q. Colby was there all the time?

A. I think that we, all of us, went out at times. Colby was away part of the time, and I was away part of the time, and Hazlett was away part of the time.

The defendant, Alfred Hazlett, testified for defendants, that he remembered the transfer of property between

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plaintiff and the defendants; was present when a portion of the papers were signed; desired to state that it was a good, long while ago; that he never had recalled the circumstances to any extent with the exception of looking over a few of the exhibits introduced in the case heretofore, and that his recollection of the matter was about this: that after the old gentleman was sentenced by the court, knowing the situation of affairs to some extent and the feeling of his children toward him, Colby & Hazlett felt somewhat anxious to have their attorneys' fees fixed up, that they might feel safe, as they had been to considerable expense and outlay. They had advanced large sums of money for him; thought it was away after the first week of the term when he was tried; that Bates had checked quite heavily on their bank account and they did not want it to rest in that way, and were particularly anxious to have it fixed up, so they might be safe when he was sent to the penitentiary; thought that Colby and witness, and perhaps Bates, went up to see him in the county jail, and had a talk with Reid about closing up their affairs; did not think they closed it when they first saw him, as there was considerable to talk over, but thought they went back the second time; not positive as to that; that Bates was with them at the time they closed up; that they made out a statement of what he was owing and of what defendants had advanced, making out a bill for Reid; could not give the exact amount of bill without referring to their books, but to the best of witness's recollection the amount was over \$6,000 for money expended and fees. The witness was further examined as follows:

Q. Do you remember the first amount agreed upon between Colby and Reid? If so, give it.

A. I think it was \$5,000. * * *

Q. State if there was any agreement or arrangement between Reid and us that we were buying it—that we were taking the property.

A. Of course we were taking the property—the title—in our names; but he certainly knew that Kilpatrick was to take it, and furthermore I would not have given—the firm would not have taken this property, unless Kilpatrick would have consented to take it off our hands.

Q. State what was said by Reid, and whether he knew of the arrangement with Kilpatrick to take the property?

A. He certainly knew all of that. I told him myself about the Kilpatricks, and furthermore told him I would not accept the proposition he had made until we had heard from Kilpatricks.

Q. Now you can state how it came that the mortgage was given for \$12,000. What was the agreement with regard to the mortgage, and our fees, and where were we to get our fees?

A. I don't know, unless it happened in this way: my recollection is, that we were to give \$4,000—that is, the personal property was to be taken in at the rate of \$4,000, as represented to us by him. That is as to the amount of personal property, and I think the real estate was to be taken in at \$12,000.

Q. And our fees were how much?

A. We were to allow him at the rate of \$12,000. * *

Q. How much was Reid to get after the payment of our fees, and how much was our fees; how much was deducted from the \$16,000?

A. My recollection is, that we discounted some. There was a little objection on his part; he thought it a little extravagant in some respects—it is not necessary to mention here—but my recollection is, that we agreed on \$5,000, for fees, and when we saw the Kilpatricks, they did not want to advance that much money and assume the mortgage; and we got \$4,000 out of them.

Q. State how it happened we made the mortgage read for \$12,000.

A. Well, sir, I don't know. I cannot account for that,

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unless it was a mistake on the part of Bates. I know it was spoken of afterwards, and I know I did not authorize it. * * *

Cross-examined by Mr. Hardy:

Q. You have been Reid's attorney in the prosecution of the state against him?

A. Yes.

Q. And all this matter of the settlement grew out of that case?

A. Yes, sir.

Q. Do you remember as to who was there all the time these papers were made out that night?

A. I don't know, outside of ourselves; there may have been other prisoners in there.

Q. It was done in the night?

A. The closing up part of it was.

Q. I understand the first time you were up there, you made no arrangements?

A. The business transaction was all talked over, no doubt.

Q. But he found fault with the amount of your fees?

A. No; as to our fees, I don't think he objected to that.

Q. The amount of your bill?

A. Yes; he thought the bill a little extravagant in some regards; I think he did. He asked us if we couldn't make our fees less, in order to do the fair thing with him.

* * * * *

Q. Do you remember a week ago Saturday evening, at the foot of your stairs, having a conversation with me in the presence of Mr. Saunders?

A. Yes, sir; I had such conversation.

Q. Was Mr. Saunders there?

A. Yes, he was; I don't know whether he was there, or Mr. Lahamie.

Q. Did you state there that your bill was compromised with Reid at \$4,000?

A. I don't think I did, Mr. Hardy; am quite confident I didn't, because I didn't know at that time.

Q. And add, "If there was anything in this matter, it was in the personal property"?

A. No, I told you this—

Q. The question is whether you said that or not?

A. I am quite confident that we did not compromise at \$4,000; but the old man was keen enough to beat us out of about \$2,000 in personal property.

Q. Then you would not attempt to be entirely positive that you didn't agree, Mr. Hazlett?

A. I would be for this reason, that I didn't know at that time. I had never looked at the papers and never read the pleadings over; I cared so little about it I did not know.

Q. I understand you to say you had forgotten about it until you had read over the exhibits?

A. Yes, sir.

Q. And your recollection is based now on the exhibits?

A. Yes, and our books, and to a great extent in rehearsing and running the matter over in my mind.

Q. Talking it over with Mr. Colby and Mr. Bates?

A. I have not talked with Mr. Bates about it; Colby came in for the exhibits, and I talked with him this morning coming up with reference to the matter.

Q. The consideration for that farm was expressed in the deed of conveyance to you, wasn't it, from Mr. Reid?

A. Well, sir, I don't know.

Q. What I wanted to know was whether the consideration you was to give for the farm was expressed in the deed for the farm?

A. Well, I don't know, Mr. Hardy.

Q. There was a bill of sale made for the personal property?

A. Yes, sir.

Q. And it was talked over, wasn't it, as to how much

the farm would be, and how much the personal property would be?

A. Yes, sir.

Q. Don't you know that the personal property was put at \$2,000, and so written in the bill of sale?

A. No, I think not; I think not; I think we agreed to give \$16,000 for the whole thing.

Q. You saw that bill of sale before you closed up your business; the bill of sale was made and signed by Mr. Reid, and you saw it?

A. I don't know as I did; we trusted to Mr. Bates to make up the papers and comply with our contract. I may have seen it, but it is doubtful.

Q. He made up the papers to comply with your contract?

A. He was told to, and I may have made up the papers myself; I don't remember now; I don't know whose handwriting they were made in.

Q. You evidently saw the note and mortgage before you signed it?

A. I should think I would; I ought to have seen it.

Q. You don't mean to say that you as a business man signed a note for \$12,000 when the agreement was that you were only to sign for only \$11,000?

A. I will tell you in answer to that—

Q. Just answer the ordinary way that other witnesses would.

A. Not if I knew it at the time.

Q. Not if you knew it, you would not be apt to do it?

A. No.

Q. The note was written in Bates's handwriting?

A. I could not say; I presume so.

Q. There was a compromise of some kind between your firm and Reid?

A. Yes.

Q. And Bates was a member of the firm?

A. No; well, he was in one respect.

Q. Not publicly; but he shared in the profits, didn't he?

A. Well, we had a private understanding with him; he was to have a certain share of the net profits.

Q. How long after the note and mortgage was given before it was ascertained there was a mistake?

A. I could not say; I know it was talked of after the papers were executed. * * *

Q. Isn't it a fact that you did not understand that your bill to Mr. Kilpatrick was about \$4,000 till you looked over the exhibits in this case and the figures; that you didn't know it was about \$4,000, the amount agreed upon?

A. I am rather inclined to think I always knew that Kilpatrick gave us \$4,000, and we turned over the papers.

Q. Isn't it, as a matter of fact, that this \$4,000 was to be your fee in the Reid case, and Reid was to pay out of the note and mortgage the costs in the case, and to pay the Bailey note of \$500?

A. I don't remember the Bailey note, nor the arrangements as to the costs, or anything of the kind.

Q. Now in your estimate of \$5,000 you included the costs, didn't you?

By the court: Included in what?

By Mr. Hardy: In the estimate presented to Reid for \$5,000.

A. I don't know now, really. Didn't he pay his own costs? My recollection is that Reid paid the costs.

Q. It was paid out of the note?

A. Out of what note?

Q. The note of \$12,000. You were to pay the costs and have it indorsed on the note.

A. No, I don't remember any such conversation about that; I don't remember who was to pay it, or how it was done; when I got through with my transaction I quit.

J. D. Kilpatrick, a witness for the defendants, testified that about the time this purchase was made he was in Omaha, and was called to the telephone by Alfred Hazlett.

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He solicited the purchasing of the farm and property by us as a matter of accommodation to the attorneys in the case and to Reid. We did not want the property, though we were buying cattle and young stock. Hazlett stated that the matter had to be decided quickly, and was anxious we should assist them, and represented that the young stock and cattle that would be turned over would make the transaction a safe one—one there could be no money lost in. Witness objected to the price of the land named, which was explained by Hazlett giving me a list of cattle and horses and young stock that was going into the transaction. He represented that Reid was very anxious that this should be consummated; the costs and attorneys' fees he wished to pay, and it would have to be done at once if done at all, and without me personally looking into the matter or knowing anything about it. Therefore I had to take the representations of Hazlett about what we were buying, and consented to the carrying out of the agreement in substance when I returned to Beatrice.

Q. Do you remember what statement he made, if anything?

A. On my return a few days afterwards, the amount of money then required was paid over, as stipulated, \$4,000, cash, with the agreement to pay the amount of costs, when decided what they were to be, and the amount to be indorsed on the note as part payment, and the property and farm to be turned over. This, in a short time, was shown to be a mistake; the farm was in the hands of Reid's family, located on the place, who had charge of the cattle and stock and the farm. We acted about as requested by the attorneys and Reid in trying to get possession and in trying to get the stock, and went to the farm thirty days later. It was time the crops should be put in. Witness was given to understand that it was the desire of Reid that an arrangement should be made by which the family could be retained on the place and the children kept together. The

place was leased to the sons of Reid. Witness then undertook to be let out of the whole transaction, asked it and thought he was entitled to that, but failed here with Hazlett & Colby; went to Lincoln and saw Reid; told him what money we had advanced on the place, and the disposition that was made of the place; asked him to take the place back and give us a mortgage for four or five years, at a reasonable rate of interest, for the money we had actually paid; not but that we would pay him for the property, the stock we had taken from the place, whatever it was said they were worth. He said he was satisfied as the matter stood; that he had his mortgage and the place was leased; and so the matter went on, and finally Mr. Colby consented to take the place back.

Q. State how much, as represented by Hazlett, his personal property was worth.

A. The list of personal property that Hazlett quoted to me, or represented to me when I got back, would be worth not less than \$4,000; there was not less than thirty three-year-old steers, and grain, etc., that never materialized, or turned over.

Q. How much corn did you get?

A. Five or six hundred bushels.

Q. What would the steers have been worth, if you had got them?

A. From thirty to thirty-five dollars a head.

Q. What was corn worth at that time?

A. About thirty cents a bushel.

By the court: You never talked with Reid until after the transaction?

A. No, not until that time I went up to see him at the penitentiary.

By Mr. Colby: State how much rental of the place you got after it was rented for the two years to the Reid boys.

A. From five to six hundred dollars; I think it was about three hundred dollars a year.

Q. State what the premises would have brought; what been worth if rented so you could have received and had full advantage of the place during these two years.

A. That would be altogether on how it is carried on. It is a good farm of 400 acres of nice land. If tilled well, would produce well. It was left in weeds and in very bad condition; there would be a material difference in the way it was looked after. I think there will be farmers close by that know the land well that can estimate about that better than I can. * * *

Q. You had no idea of buying this place until you were called to the telephone in Omaha by Hazlett?

A. No, I had no thought on the matter at all. .

Q. I understand you to say that what you did was largely to accommodate the firm of Colby & Hazlett, to let them out?

A. It was wholly with that intention.

Q. How long were they talking at the telephone?

A. Not long; but long enough to give an idea of the character of the land, and the number of head of stock, etc.; that it was a good farm, worth thirty-five dollars an acre, situate four or five miles from DeWitt. He impressed on me the necessity of having a decision, and I said enough so that he would calculate on it, that we would accept the trade on those conditions.

Q. You had not seen the farm, nor Reid, who you knew was about to go to the penitentiary?

A. No, I had not seen Reid, nor the farm, and I knew the circumstances, but did not think upon the fact that he had been kept away from the farm; but I should have known.

Q. That is where he could not have known, and I understand you that Hazlett told you their fees were \$4,000, and advances?

A. No, Hazlett asked me for \$5,000 cash, and I asked him if a less amount would not answer just at that time.

I was in Omaha at that time engaged in a settlement; I asked him because it was a necessity; if I told him I would pay a certain amount of money, I must know.

Q. Didn't you testify on direct examination that he asked you for \$4,000?

A. No; I think I said I paid when I came home, over \$4,000. No, he asked me \$5,000.

Q. He told you there had got to be costs paid?

A. He told me \$5,000 cash; that is the way he put it to me, and thought after a while when it was found just what it would be—Reid wanted the costs paid or provided for, and that they would be some large amount, not knowing definitely what they would be. He asked for \$5,000, and I asked if \$4000 would not do, and he said it would. He gave me to understand that by paying \$4,000 we would fix it up.

Q. He didn't tell you how much was going to the firm of Colby & Hazlett?

A. I didn't pretend to know anything about that, nor their arrangement for fees at that time. All I know about that I have heard since that time.

Q. When you went to the penitentiary to see Reid, Hazlett went with you?

A. Yes.

Q. And you were present afterwards, on July 31, 1885, when Hazlett wrote Reid? Your proposition was to have Reid take the farm back at \$40 an acre?

A. No, I talked with Reid; I asked him to take the farm back on the same conditions I bought it, and I offered to turn the farm over to Colby & Hazlett for \$500 less than I paid for it. * * *

Q. You never saw any of the property on this farm until you bought it?

A. No.

Q. Neither you nor your brother went up to see it before you had the deed from Colby & Hazlett?

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A. I think not. My recollection is I committed myself in Omaha.

Q. You don't pretend to say that you in Omaha had agreed to buy \$16,000 worth of property you never saw, solely upon the word of Hazlett?

A. His representation; yes, I did that, I will acknowledge.

By the court: Did any of you look at the property before you paid the money and took the deed?

A. No, my recollection is that we did not. There was a hurry to get this thing fixed up, and we had both Hazlett and Colby—both had agreed with us we should lose nothing; that was only a temporary emergency to be met and it would be a great accommodation, and there would be no loss. They represented everything as being amply worth what had been paid for it, and we would sustain no loss in doing that, and do them a great accommodation, and so on, and it was accepted.

Q. I would like to ask what this personal property was worth?

A. I don't think we got to exceed \$1,500 worth of property.

By Mr. Hardy: I will ask you what that place at that time was worth?

A. I would have valued the farm at \$30 an acre at that time. It was a lump trade. I didn't consider what we called the farm, so the aggregate was the same.

Q. What were you told about the improvements?

A. That it was a good, new, farm house, insured for \$1,000, with 200 acres broken on the farm.

Q. And the whole business went over in five minutes back and forth?

A. Yes, I think we did it in five minutes.

The deposition of William H. Reid, the plaintiff, taken at the penitentiary, was read in evidence on the trial. So much of it is copied as relates to the point under consideration:

Q. State whether or not the defendants Colby & Hazlett rendered any professional services for you prior to March, 1884?

A. They attended to my case as my attorneys.

Q. State whether on or about March 7, 1884, you had a settlement with them as your attorneys for their fees and disbursements?

A. We had a settlement.

Q. State what you settled, and how you settled.

A. Fees, expenses, and costs, as I understood it at the time. I sold them what property I had for \$16,000, and I was to give them \$4,000 out of the sale for their fees, expenses, and costs, as I understood it, in my case.

Q. State how much the farm was sold for, and how many acres were in the farm?

A. Four hundred acres; price was \$14,000.

Q. State what was said between you and them about the price of the farm, and in regard to its value?

A. Don't know as I can tell what was said about the value. The price was agreed upon.

Q. At how much?

A. At \$16,000 for my land and personal property.

Q. State how much they were to pay you for the land, and how much for the personal property.

A. Fourteen thousand dollars for the land, and two thousand dollars for the personal property, as I remember.

* * * * *

Q. State whether or not in allowing the defendants \$4,000, in your settlement with them, there was any mistake made.

A. In what shape?

Q. In which you took from them a mortgage and note for \$12,000, when it should have been but for \$11,000, as they claim?

A. There was no such mistake as I know of; I have no recollection of it.

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Q. How much did you claim you were owing them at that time, which they wanted you to pay or secure?

A. I don't remember that they ever told me how much I did owe them.

Q. How much was it agreed upon that you should allow them in this settlement?

A. Four thousand dollars. I understood at the time that they were to have \$4,000, and they were to pay expenses and costs, and they were to get me out of here within a year. I think Mr. Colby told me that I would have plenty to start upon—\$12,000 and interest—and they would get me out within a year. I supposed they were to pay the costs and expenses, and their fees were included in that for attending to my case afterwards.

Q. Do you remember whether or not you agreed to give them an additional \$1,000 if they should get you out within a year, and was that included in a receipt they gave you at the time? State what you know or remember about that?

A. Well, there was no other agreement except the first one for \$4,000. All was included in that.

Cross-examination:

Q. Was not the agreement between you and Colby & Hazlett in writing?

A. In regard to what?

Q. In regard to your employment of them in your case.

A. I think it was.

Q. Have you that agreement, or a copy of it?

A. I had a copy; I sent it to Mr. Hardy.

Q. Is not there a receipt for \$5,000 indorsed on that agreement by Colby & Hazlett?

A. I think I have a receipt for \$5,000.

Q. Have you that receipt now, or can you procure it? If so, will you produce it?

A. I have, and I now produce it:

"BEATRICE, NEB., August 7, 1882.

"Memorandum of agreement by and between Colby & Hazlett of the one part, and William H. Reid, of the other part: It is mutually agreed between Colby & Hazlett, attorneys, and W. H. Reid, that the said Colby & Hazlett are to be employed and are hereby employed, and retained, as attorneys for the said W. H. Reid, to defend him, and have the sole charge and management of the defense of his criminal case for the killing of his wife, and have the entire management, care, and responsibility, of the same; and to work up the said defense and faithfully discharge the duties devolving upon them as attorneys for said Reid through said cause, in consideration of the sum of \$150, which is paid them this day, as a retainer, and in consideration of a reasonable, fair, and liberal compensation, to be paid them by the said Reid in addition, for their services. The said Reid is to pay the necessary and reasonable expenses in the court, working up, and defense of his case, procuring facts, evidence, and material, for defense in his behalf, and the expenses of his attorneys in obtaining of the same, and he to perform the ordinary duties of client to attorneys.

"[Signed in duplicate.]

COLBY & HAZLETT.

"W. H. REID."

Indorsed on back:

"Received of William H. Reid the sum of \$5,000 in full satisfaction and payment of all claims and demands against him for legal services and expenses up to date in the case of State of Nebraska v. Wm. H. Reid, and in full of all fees for services and expenses hereinafter to be rendered by us in and about said case."

Q. Did not the defendants Colby & Hazlett make out and deliver to you an itemized statement for their fees, charges, and expenses, in your behalf, in writing?

A. No, sir; not that I remember of. I don't think I ever saw one.

Redirect examination :

Q. State how you came to have a receipt for \$5,000 from Colby & Hazlett?

A. When I made the sale there was \$4,000 came out of the land. I had paid them money before—I think about \$800.

Q. State what was included in this receipt of \$5,000?

A. The \$4,000 they received out of the place, and what I had paid them previous.

Q. Was it agreed or understood at the time of the settlement that you were to allow them \$5,000 out of the property they purchased of you?

A. No, sir; it was \$4,000.

Q. Do you swear that that receipt of \$5,000 included any sum paid by you prior to that time?

A. I think it did.

Q. Do you swear positively?

A. Messrs. Colby & Hazlett made it out and gave it to me, and I understood it included that.

Q. You also swear that you didn't know what Colby and Hazlett's bill amounted to, and that they never made any statement of that bill to you?

A. I do. I didn't know what their bill amounted to, and I don't remember of their making any statement to me.

Q. Do you know and were you not told by Colby & Hazlett for what and to whom the \$800 which you say you had paid to them had been expended and paid?

A. No, sir; I don't know who to. I think they said they had been at considerable expense. I don't think they ever told me what they were.

Q. Did they not tell you what it cost, and what they had to pay Dr. Mathewson?

A. No, sir; I have no recollection of it.

Q. Did they not tell you, and did you not know, what they had to pay Dr. Fuller?

A. No, sir; I don't remember. I can't place the man now.

Q. Did they not tell you, and do you not know, what they had to pay the superintendent of the Topeka insane asylum?

A. No, sir; I don't remember it.

Q. Do I understand you to swear that you do not recollect, or that they did not tell you these things?

A. I mean to swear that I do not recollect your telling me, and I think you did not tell me.

Q. Don't you remember of stating to defendant Colby that you thought Dr. Mathewson's bill rather high?

A. I do not. I think Mr. Colby never spoke to me about it.

Q. Do you remember of defendant Colby telling you what it cost to take those depositions in Allamakee county, Iowa?

A. I think it was \$68 for notary's fees, but would not be certain.

Q. You don't recollect of any of the defendants telling you, or your ever knowing, any of the other costs and expenses?

A. I don't remember any other particular expenses.

Q. Don't you remember of the defendants Colby & Hazlett figuring up with you and showing you the amount of the costs and expenses of the first trial of your case?

A. It seems to me that you and Mr. Hazlett did figure on it, but I am not sure.

Q. Did not the defendants Colby or Hazlett give you written receipts for the money paid by you to them prior to March 7, the date of the mortgage?

A. I think they did for what money I gave them before this settlement. It was spoken of at the time I think. It was said by one of you that that last receipt would cover up the others.

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Q. Have you those receipts in your possession, or under your control? If so, will you produce them?

A. I think Mr. Hardy has them.

Q. Do you swear that you recollect of any remark made by defendants Colby & Hazlett, or by any other person at the time of the settlement, that that last receipt would cover up the others, or anything of that kind or nature?

A. That is what I think.

A. Hardy Esq. testified for the plaintiff:

Q. Did you have a conversation with Mr. Hazlett a week ago Saturday evening about this case?

A. I did.

Q. State what that conversation was?

A. Mr. Saunders was there, and Mr. Hazlett asked that we consent that his testimony be taken at some other time, as he had important business to attend to at Omaha. I said his testimony would probably be needed in the case. I said to Mr. Hazlett in regard to that \$5,000 business, I don't think you think there is anything of it. Mr. Hazlett made this remark; he said, I think we claimed five thousand, but it was compromised, as I understand it, at four thousand, and if there is anything in that matter, it is in the personal property. Mr. Saunders stood near by.

Cross-examined by Mr. Hazlett:

Q. Did you and I have a talk about the merits of the case?

A. No further than that.

Q. Isn't all I asked you, to get your leave to go away and to give my testimony after I came back?

A. That is just what you wanted.

Q. That was what I was after and you hated to let me go. Now do you intend to swear that I said we compromised our fees at four thousand dollars?

A. I intend to swear that you used the word "compromised" and said "four thousand dollars."

Q. Did I say that, or did you say it?

A. You said it.

Q. What does Saunders say?

A. He says the same thing.

Q. You are attorney in this case?

A. Yes, sir.

The general object and purpose on the part of the defendants Colby & Hazlett in their interview and transactions with the plaintiff which terminated in the execution and delivery of the deed by him to them and of the note and mortgage by them to him on the night of March 7, 1884, was to make such a disposition of his property as would produce the money claimed by them for their fees and expenses earned and incurred in making his defense, and the object of their haste and industry carrying their operations far into the night was that such disposition might be made before the threatened restraint should be placed upon him by the courts, and he be prevented from making it. In making this disposition of plaintiff's property, it does not appear that either of the parties contemplated or desired the immediate, or cash, payment down of more than a sufficient amount to pay the said fees and expenses. It appears from the testimony of L. W. Colby, Alfred Hazlett, and C. O. Bates, that the bill for services and expenses held by them, and presented to the plaintiff on that occasion, amounted to \$6,134.30, and that after allowing payments formerly made amounting to \$800, there was a balance due Colby & Hazlett of \$5,334.30. According to the testimony of Mr. Hazlett, there were some objections made by the plaintiff, and the amount was reduced, and finally agreed upon at even \$5,000. This is not so clearly stated by the other witnesses for defendants; but they all agree that the amount which was to be deducted and retained by Colby & Hazlett out of the price of the farm and personal property, was even \$5,000, and in communicating to Kilpatrick, then at Omaha, by telephone, that was the sum which they at first represented as necessary to

be paid down; but that upon Kilpatrick objecting to advancing that amount in cash down, they consented to take \$4,000. J. D. Kilpatrick, with whom this telephonic conversation was held by Mr. Hazlett on the part of Colby & Hazlett, corroborates this testimony. It appears that at this settlement Colby & Hazlett gave to the plaintiff a receipt for \$5,000 in full satisfaction and payment of all claims and demands, etc. This receipt was retained by plaintiff, and upon the demand of defendants produced at the trial. This receipt and its possession by the plaintiff, is evidence of the highest character that the amount understood and agreed upon at the settlement was \$5,000, and not \$4,000. In this connection I will observe that the plaintiff in his deposition stated that this receipt covered other sums previously paid; but he does not anywhere claim that he had paid them to exceed \$800, previous to this settlement, and there is nothing in the history of these somewhat unusual transactions to lead us to believe that the parties would receipt for even \$200 more than they had received or expected to receive, and a part of which they had previously receipted for. I will make no further examination of the facts stated by the plaintiff in his deposition, which are set out at considerable length in this opinion, further than to say that in so far as they relate to the point now being considered, they are chiefly negative in their character, and that they fail to convince the mind of the writer, or sufficiently explain the evidence of a mistake in hearing in the facts above referred to, or of the testimony of the defendants and the witness C. O. Bates.

The consideration of this case brings us quite up to the frontier of the question of the power of a court of review, to reverse or modify the judgment or decree of a trial court upon a matter of fact, under the law and precedents. It must be admitted that such power does not extend to cases of mere conflicting evidence. The rule has been often stated in this court, and applied to cases then under consideration.

In most of these cases, so far as my memory extends, the rule was invoked as a reason, on the part of this court, for refusing to disturb the judgment of the trial court; but such has not always been the case. Among the first of these cases was that of *Seymour v. Street*, 5 Neb. 85, cited by counsel for appellee. In that case the rule is stated in the syllabus as follows:

"5. The findings of a court, when substituted for a jury are entitled to the same weight as the verdict of the latter.

"6. Where a verdict or finding is *clearly wrong*, it should be set aside; but if there is only doubt as to its correctness it will not be disturbed."

In the case of *Blackburn v. Ostrander*, reported in the same volume, at page 219, the court in the opinion says: "It is not the number of witnesses produced by a party, nor their language alone, that should be looked to in determining whether a new trial should be granted, but all the surrounding circumstances should be taken into the account and given due weight." And again, in the case of *The A. & N. R. R. Co. v. Washburn*, also reported in the same volume at page 117, the court in the syllabus says:

"4. A mere difference of opinion as to the weight of evidence between a reviewing court and the court which tried the cause, is not sufficient to reverse a judgment. To do so, the preponderance of evidence must be clear, obvious, and decided, or so great as to indicate prejudice, partiality, or corruption.

"5. A judgment will not be reversed on the ground that the finding or verdict is contrary to the evidence, unless it manifestly is so; and the reviewing court will always hesitate to reverse when doubts as to its propriety arise out of a conflict in oral evidence."

The above cases have been followed in those of *Potvin v. Curran*, 13 Neb. 302; *Hartley v. Dorr*, 15 Id. 451; *Courtney v. Price*, 12 Id. 189; *Jenning v. Simpson*, Id. 558; *Aultman v. Patterson*, 14 Id. 58; and in many subsequent

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cases. In no case has it been held, nor can it be, that greater weight will be accorded to the finding of a court in a case tried to it without the intervention of a jury, than to the verdict of a jury; nor has the court ever denied itself the power or the duty to reverse or modify either finding or verdict where it was its clear and settled conviction, upon a review and consideration of the entire evidence, that the tribunal making it had reached an erroneous conclusion to the prejudice of the party complaining. In this connection I copy from the opinion of this court in the case of *Fisk v. The State*, 9 Neb. 62. "A court that would shelter itself behind an erroneous verdict to sustain a judgment that is *clearly wrong*, is unworthy of the name. But a mere difference of opinion between the court and jury is not sufficient to justify the reversal of a case. But where it is clearly wrong it will be set aside, and such has been the uniform holding of this court from its organization. (Citing cases.) In no other way can the rights of parties be protected."

In the case at bar there is no direct finding upon the question of a mistake in the amount of the note; but from a recomputation of the note from the date which it bears to the date of the finding it is quite apparent that in the finding the court rejected the claim and evidence of the defendants of a mistake in the amount of the note; and in so doing, I think, for the reasons above stated, the trial court was clearly wrong.

The finding and judgment of the district court are reversed, and a finding will be entered in the court as of the date of May 1, 1889, in favor of the plaintiff, in the sum of \$13,370.32, and a judgment and decree of foreclosure entered herein in his favor for said sum and as of said date.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

MICHAEL W. OSBORNE, APPELLANT, v. JOHN FITZGERALD, APPELLEE.

[FILED MAY 16, 1889.]

1. **Partnership: EVIDENCE.** In an action by A against B upon an alleged contract of partnership for an accounting, *held*, that the weight of testimony failed to establish the partnership.

APPEAL from the district court of Lancaster county.
Heard below before FIELD, J.

Harwood, Ames & Kelly, for appellant.

Marquett, Dewese & Hall, for appellee.

MAXWELL, J.

The plaintiff brought an action against the defendant in the district court of Lancaster county for an accounting as partner in certain grading contracts. On the trial the court found the issues in favor of the defendant and dismissed the action. The questions presented to the court are solely questions of fact.

The plaintiff states his cause of action as follows:

"That during the years A. D. 1883 and 1884, the defendant, John Fitzgerald, entered into a contract or contracts, the particular dates and the descriptions and the specific terms of which this plaintiff is ignorant of, and therefore cannot state, with the Chicago, Burlington & Quincy Railroad Company, a railroad corporation doing business in this state, for the construction of a line of railroad in this state, known as the Nebraska & Colorado railroad, from the town or station of Kenesaw to the town or station of Oxford, in this state, and that on or about the first day of August, 1883, said defendant and this plaintiff entered into a parol contract of partnership for the construction of said railroad,

Osborne v. Fitzgerald.

or so much thereof as said parties should consent to construct, pursuant to said contract or contracts with said first-named road, by the terms of which it was agreed that this plaintiff should sustain one-fourth of the losses and enjoy one-fourth of the profits, and that the defendant should sustain three-fourths of the losses and enjoy three-fourths of the profits of such construction; and that said defendant should furnish the necessary moneys and capital for the carrying out of said contract, and that this plaintiff should devote his time, labor, skill, and experience, to the securing and employment of laborers and material therefor, so far as necessary, and to the superintendence and control of said work during the process of such construction. And this plaintiff further says, thereupon the plaintiff and defendant did, as such co-partnership, enter upon the construction of said railroad, and during said years 1883 and 1884, fully performed the same by the construction of said railroad between the places above named. And the plaintiff avers that by the means aforesaid, the said co-partnership earned and acquired a large sum in profits, the exact amount of which the plaintiff cannot state, but which exceeded the sum of one hundred thousand dollars, which has been allowed and paid by said Chicago, Burlington & Quincy Railroad Company to said defendant, but that said defendant refuses and neglects to account for the same to this plaintiff, or to pay the same or a part thereof over to this plaintiff, although upon just and fair accounting, there is and would be found due to this plaintiff, a large sum of money from the defendant by reason of the premises, exceeding as plaintiff is informed and verily believes, the sum of twenty-five thousand dollars."

The answer is a general denial.

The plaintiff testifies in substance that he was to have an interest in the contract, but the amount of the interest was not agreed upon; that about the time of the completion of the work to Minden, he spoke to the defendant about the

amount of interest he was to have, and that the defendant informed him that he would have a fourth. The defendant denies absolutely any contract of partnership, or that he ever agreed to permit the plaintiff to share as a partner, or promised him a fourth interest in the contract, or any other interest. He also testifies that he employed the plaintiff on the work to superintend the same at a salary of \$150 per month. If the plaintiff was a partner with the defendant, as he contends, it is somewhat remarkable that the terms of co-partnership were not spoken of nor agreed upon in advance. This, the plaintiff's own testimony shows was not done, nor any attempt made to agree upon terms, until a considerable portion of the work had been completed; and the proof of the alleged contract rests upon the plaintiff's own unsupported testimony. It is claimed on behalf of the plaintiff that his testimony is corroborated by certain directions of the defendant to station agents to recognize only the receipt of the plaintiff in delivering freight, etc. But this proof is not inconsistent with the defendant's testimony, that the plaintiff had charge of the work for him, and was authorized to receive property shipped to the defendant.

Upon the whole testimony it is apparent that the weight of testimony fails to establish a contract of co-partnership. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

THE STATE OF NEBRASKA, EX REL. J. C. MANN, v.
JOSEPH T. ANDERSON ET AL.

[FILED MAY 16, 1889.]

Counties: SALE OF PUBLIC GROUNDS: VOTE REQUIRED. The language of section 30 of part 1, chapter 18, of the Compiled Statutes, *held*, to require a number of votes equal to two-thirds of all the votes cast upon any one question, or for all of the candidates for any one office voted for, or to be filled, at the election at which is submitted a question of selling the public grounds or buildings of a county, to be cast in favor of such proposition, in order to the adoption of such proposition.

ORIGINAL application for mandamus.

I. L. Albert, for relator.

J. A. Price, for respondent.

COBB, J.

This is an application by J. C. Mann, relator, for a peremptory writ of mandamus to the respondents, who are county commissioners of Boone county, requiring them to forthwith accept the offer and tender of the relator to purchase and pay for a certain lot of ground, the property of the county, which, it is alleged, was offered for sale at public auction to the highest bidder by the respondents and bid off by the relator, who was the highest bidder therefor.

The relator alleges that on November 6, 1888, the duly qualified and acting board of commissioners of said county, at a general election holden in and for said county, submitted to the qualified electors of the county in the form and manner prescribed by law the following proposition: "Shall the board of county commissioners of Boone county, Nebraska, be authorized to sell the county grounds

26	517
43	644
26	517
50	131
50	629
51	814
53	565
26	517
159	708

belonging to said county, being lots one and two in the village of Albion, in said county of Boone, known as the court-house square, and purchase others in lieu thereof?" that said proposition was duly submitted to the qualified electors, the election was duly held, and the votes cast thereat on the proposition were duly returned and canvassed; that there were cast in favor of the proposition 857 votes, and 332 against it, and that said county commissioners, upon the due return and canvass of the votes cast, by resolution by them duly adopted, declared the proposition to be carried; that on January 11, 1889, said board of commissioners by resolution duly adopted, subdivided said lots one and two into six lots, and of the said six was one described as follows, to wit: "Beginning at a point twenty-two feet south of the northeast corner of lot one in block twelve, and running thence west 132 feet, thence south twenty-two feet, thence east 132 feet, thence north twenty-two feet to the place of beginning;" that on said 11th day of January, 1889, said board of commissioners, by resolution duly adopted, fixed the time, place, and terms of sale of each and all of said six lots, as follows, to wit: to be sold separately at public auction to the highest bidder, at one o'clock P. M., March 4, 1889, at Albion, Boone county, on the following terms, viz., the purchase price for each to be paid in three equal payments, the first cash on the day of sale, the second in one year, and the third in two years, from the day of sale, both to be secured by mortgage upon the lot sold, and to bear interest at seven per cent per annum from date of sale; that the lowest price at which each of the six lots would be sold was fixed for the first, \$2,000; for the second, \$1,000; for the third, \$1,000; for the fourth, \$1,000; for the fifth, \$1,000, and for the sixth, \$1,500; that in pursuance of said resolution, said commissioners, on March 4, 1889, at 1 P. M., offered said lots for sale at public auction to the highest bidder upon the terms set out, due notice having been given as required by law, at which

sale the relator was the highest bidder for the second lot described, which was struck off to him at the price of \$1,000; that the relator immediately on the day of sale tendered to said board of commissioners one-third of the purchase money for said lot, and also a mortgage on the same to secure the full purchase price, in conformity to the terms of sale, and was ready and willing to comply with the conditions and terms of sale in every respect, and demanded of the board of county commissioners a deed of conveyance of said lot so purchased by him, which said commissioners neglected and refused to accept either the offer and tender, or to make the deed, for the lot sold by them as aforesaid, and still neglect and refuse to convey said lot to the relator; wherefore he asks that a peremptory writ of mandamus be issued commanding the respondents forthwith to accept the said offer and tender and to convey to the relator the said lot sold to him as aforesaid.

The application was presented and heard on the following stipulation of the parties:

"It is agreed that the above-entitled cause shall be submitted upon the following statement of facts:

"I. That the statements of the petition are true."

"III. That said proposition was submitted to the qualified voters of said county at a general election on November 6, 1888, at which there were cast for presidential electors 1,844 votes.

"IV. That said proposition to sell the county grounds received 1,189 votes, of which 857 were in favor of and 332 were against the proposition.

"V. That said proposition received two-thirds of all the votes cast on the proposition.

"VI. That said proposition did not receive two-thirds of all the votes cast at said general election.

"VII. That the votes cast on said proposition were upon the same ballots and deposited in the same ballot-box as the ballots for officers voted for at said general election;

that the same judges and clerks presided, and the same poll list and tally sheet were used, and the returns on said proposition canvassed by the same board that canvassed the returns of said general election.

"VIII. That the only question at issue is whether said proposition should, in order to carry, have received two-thirds of all the votes cast at said general election, or two-thirds of all the votes cast on said proposition.

"I. L. ALBERT, *Attorney for Relator.*

"J. A. PRICE, *Attorney for Respondents.*"

This application turns upon the construction to be placed upon the statute providing in what cases and upon what terms and conditions the county boards "may sell the public grounds or buildings of the county and purchase others in lieu thereof." Section 23, article 1, chapter 18, Compiled Statutes, gives the county board such general authority. Section 24 provides that "The county board shall not sell the public grounds as provided in the third subdivision in the preceding section without having first submitted the question of selling such public grounds to a vote of the electors of the county." Sections 27, 28, and 29, provide the mode of submitting questions, including that of selling the public grounds, to the electors of the county, and of canvassing and returning the votes thereon. Section 30 provides that "If it appears that two-thirds of the votes cast are in favor of the proposition, and the requirements of the law have been fully complied with, the same shall be entered at large by the county board upon the book containing the record of their proceedings, and they shall then have power to levy and collect the special tax in the same manner that the other county taxes are collected. Propositions thus acted upon cannot be rescinded by the county board."

The question submitted depends upon the construction of the language of this section. Do the words, "two-thirds of the votes cast," mean two-thirds of the votes cast at the

polls of the general election at which the question was submitted to the electors, or do they mean two-thirds of the votes which shall be cast upon the question itself, the sale of the public grounds, submitted at the election? If the latter, then the relator is entitled to the writ; but if the former, then the proposition has failed, and the writ must be denied.

Section 1, article 15, of the Constitution of this State, provides for the submission of amendments to the Constitution to the electors for approval or rejection, and provides that "if a majority of the electors voting at such election adopt such amendments, the same shall become a part of this Constitution." These words have been considered and construed by this court in the case of *State v. Babcock*, 17 Neb. 188, in which the question of a proposed amendment to the Constitution had been submitted at a general election at which senators and representatives were elected to the legislature, and at which 132,000 votes were cast. The proposed amendment to the Constitution received but 51,959 votes in its favor, and 17,766 were cast against it. The holding of the court was that the number of the votes for the amendment being less than a majority of the votes for senators and representatives, the proposed amendment failed of adoption.

It is hardly worth while to remark that the writer did not at the time concur in that opinion; but it followed in principle an earlier decision of the court, and probably is supported by the weight of authority, and may be regarded as expressing the settled doctrine in this state. Comparing the language of the section of the Constitution thus construed, and that of the section of the statute here considered, I am unable to distinguish any difference between the two. The writ is therefore denied.

WRIT DENIED.

THE other Judges concur.

THE CITY OF OMAHA, PLAINTIFF IN ERROR, V. ELLEN
SCHALLER, DEFENDANT IN ERROR.

[FILED MAY 31, 1889.]

1. **Municipal Corporation: GRADING STREETS: DAMAGES.** In an action against a municipal corporation for damages sustained by a lot owner by reason of the excavation of a street in front of the property, for the purpose of reducing it to an established grade, the question of the proper method of proving damages cannot be for the first time raised in the supreme court.
2. ———: ———: ———. Special benefits, which should be deducted from damages sustained by real estate by reason of a public improvement, must be such as specially benefit the particular property damaged, aside from benefits conferred upon other property generally in the neighborhood of or adjacent to the improvement.
3. Instructions examined and no error found in such as were given, or in refusing those not given.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

J. L. Webster, for plaintiff in error, cited: *Chicago & Pacific R. R. Co. v. Frances*, 70 Ill. 238; *Eberhard v. C. M. & St. P. Ry. Co.*, Id. 347; *Shawneetown v. Mason*, 82 Id. 337; *City of Denver v. Bayer*, 7 Col. 113; *City of Atlanta v. Green*, 67 Ga. 386; *City Council of Montgomery v. Townsend*, 80 Ala. 489; *Penn. R. R. Co. v. Marchant*, 27 Am. L. Register, 381.

A. C. Wakeley, and *Lake & Hamilton*, for defendant in error, cited: *Parks v. Hampden*, 120 Mass. 395; *Whitcher v. Benton*, 50 N. H. 25; *Milwaukee R. R. Co. v. Eble*, 4 Chandler, (Wis.,) 72; *Petition of Mount Washington Road Co.*, 35 N. H. 134; *Carpenter v. Landaff*, 42 Id. 218.

REESE, CH. J.

This is a proceeding in error to the district court of Douglas county. The first trial resulted in a verdict and judgment in favor of plaintiff in error, when the cause was reviewed by this court and reversed, and a new trial granted. The second trial resulted in a verdict in favor of defendant in error for \$2,050. A motion for a new trial was made and overruled, and plaintiff in error now brings up the cause for review by proceedings in error, the principal contentions being that the verdict was not sustained by sufficient evidence; that even if supported by the evidence, it was excessive; that the court erred in giving certain instructions to the jury, and in refusing to give certain others asked by the city on the trial.

These questions will be noticed in their order. It will not be necessary to restate the facts, as they are fully stated in the opinion written by Judge MAXWELL on the former hearing, which is reported in 22 Neb. 325.

As to the first contention, we must be content in saying that we find the evidence conflicting to such an extent as to preclude inquiry into this part of the case. The method of proving damages adopted by defendant in error was by showing what it would cost to remove the dwelling house and barn from the lots which were alleged to have been damaged by the excavation made in grading the streets, the loss of cellar, well, and cistern, fruit and shade trees, etc.; and the cost of bringing the lot down to the proper grade. There seems to have been no serious contention upon any of these questions except as to the cost of grading the lots. Witnesses for plaintiff and defendant differed as to the number of cubic yards in the work; the depth to which the excavation would have to be, the cost per yard, and the probable price for which the removed earth could be sold. The jury was fully informed as to the condition of

the property, both before and after the excavation had been made. If the evidence for defendant in error was correct, and of this the jury were the sole judges, the verdict was right, and was not excessive. Objections are now made to the method adopted by defendant in error in proving her damages. Upon this part of the case it must be sufficient to say that no objection was made upon the trial; and as the method adopted seems to have been entirely satisfactory to both parties at that time, the question cannot now be considered. This is especially true since upon an examination of the whole case we find the evidence a sufficient basis for the verdict.

It is next insisted that the court erred in its instructions to the jury, and in refusing to give instructions asked by the city. The instructions given, and of which complaint is made, were as follows:

"2d. As against the damages, if any, which you may find the plaintiff has sustained by reason of the grading of the streets, you will set off and deduct such special benefits, if any, which have been conferred upon plaintiff's lots referred to, by the grading of the streets along and in front of the lots, and if such special benefits, if any, you find to have been equal to or in excess of the damages, then the plaintiff cannot recover.

"3d. By 'special benefits' are meant such benefits, if any, as accrued to the lots by the grading of the street, by reason of their fronting upon a street better graded than before, or by being rendered more accessible, if previously inaccessible, or any other benefits conferred specially by the grading of the streets, upon plaintiff's lots, which are not shared by the property in general upon the street or in the vicinity of the improvements.

"4th. Such benefits, if any, as were conferred by the grading of the street, upon plaintiff's lots, which were shared in common by all other lots upon the street or in the vicinity thereof, cannot be considered in estimating the

amount of 'special benefits' to be deducted from the damages sustained by plaintiff by reason of the grading of the streets.

"5th. The benefits which may be so considered, are no less 'special benefits' because other lots on the same street and similarly situated to plaintiff's lots, have all been benefited in some degree by the same improvements, and in like manner.

"6th. If you find from the evidence, that by reason of the grading of the streets the lots of plaintiff were so specially benefited in the particulars above specified, as that the market value of the lots after the grading was as great or greater than it was before the grading, the plaintiff is not entitled to recover in this action; but in considering the question of the benefits derived by plaintiff's lots from the grading, and the effect produced thereby upon the market value of the lots, you will be careful to distinguish between such benefits as are common to all the property on the street or in the vicinity of the street, and such as arose from the peculiar location of these lots, and their situation with reference to the street and the previous condition of the street immediately in front of these lots. The first are called 'general benefits,' and any addition to market value by reason thereof are not to be considered, nor is any *general* advance in market values owing to the growth of the city, or any other causes, to be considered; but the benefits arising from the peculiar location of the lots and their situation with reference to the street and the previous condition of the street in front of the lots, and the betterment of the lots by reason of the changed condition of the street in front of them, are called 'special benefits,' and any increase in value of the lots by reason thereof may be considered."

Plaintiff in error requested the court to give the following instruction, which was refused:

"The jury are further instructed that whatever enhancement in value the plaintiff's lots received by reason of the

grading, by making the same more accessible and thereby causing them to front on better streets than theretofore, such enhancement in value would be special to the plaintiff's property and the city would be entitled to have the same offset against any damages proven by the plaintiff."

By the second instruction given, the court very properly instructed the jury that special benefits could be set off against the damages sustained. By the third, fourth, fifth, and sixth instructions, what are denominated special benefits are fully and in substance correctly defined; at least we are unable to see anything of which plaintiff in error could complain, the fifth being fully as liberal as plaintiff in error could have desired.

The instruction asked by plaintiff was properly refused. It was too general in its definition of "special benefits." It would not do to say that whatever enhancement of value the lots received by reason of the grading of California street, and of Twenty-fifth street, providing such enhancement in value was directly caused by grading the street, and making the lots more accessible and causing them to front on better streets than previously, would constitute a special benefit, for these betterments might be common to every foot of property fronting on the streets named. A special benefit to be deducted from damages caused by a public improvement, must be one that is, in some degree at least, specially enjoyed by the property damaged; that is, one that specially benefits the particular property aside from the benefit conferred upon other property in the neighborhood of or adjacent to the property in question. These would constitute general benefits, and they must be excluded. (*City of Omaha v. Kramer*, 25 Neb. 489. See also cases cited in brief of defendant in error.)

We are unable to detect any error in the record. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

EDWARD G. WOOD, APPELLANT, v. PETER O'HANLAN,
MARGARET O'HANLAN, PATRICK O'HANLAN, AND
JOHN F. THOMPSON, APPELLEES.

[FILED MAY 31, 1889.]

Practice. The case depending almost exclusively on an examination of questions of fact, the evidence is reviewed, and *held*, to sustain the decree of the district court.

APPEAL from the district court for Dawes county. Tried below before KINKAID, J.

Sprague, Fisher & McCann, and *Talbot & Bryan*, for appellants.

Alfred Bartow, for appellees.

REESE, CH. J.

This action was instituted in the district court of Dawes county, and was in the nature of a creditor's bill for the purpose of subjecting lots number nineteen and twenty in block four of the city of Chadron, to the payment of a judgment held against Peter O'Hanlan, and rendered by the district court of said county, at the February term thereof, 1886, in favor of plaintiff. It was alleged in the petition that on the 29th day of October, 1885, Peter O'Hanlan was the owner in fee of the lots mentioned, and that on said date said Peter O'Hanlan and his wife, Margaret O'Hanlan, fraudulently conveyed the property to Patrick O'Hanlan, a nephew of Peter, without consideration, with knowledge and intent on the part of the grantor to hinder and defraud appellant, and with like knowledge and intent on the part of Patrick O'Hanlan, the grantee; that on the same day Patrick O'Hanlan, with a like fraudulent intent, reconveyed the property to Margaret O'Hanlan, the

wife of Peter. It was further alleged that an execution had been issued upon plaintiff's judgment, and had been returned unsatisfied, and that defendant, Peter O'Hanlan, was insolvent. To this petition Peter O'Hanlan and Margaret O'Hanlan filed their answer, in which they admitted substantially all the averments of the petition except as to the fraudulent character of the transaction between them and Patrick O'Hanlan, and as to the prior ownership of the property by Peter O'Hanlan, it was alleged in substance that Peter O'Hanlan never had at any time been the owner of the property in question; that the same was purchased of her grantor by Margaret O'Hanlan, with her separate and individual means, the title to lot nineteen having been taken by her at the time of the purchase, and the title to lot twenty having been taken in the name of Peter O'Hanlan by mistake and without her knowledge. It was alleged that at the time of the execution of the deed to Patrick O'Hanlan, the defendant Margaret O'Hanlan, who was then the owner of the property, was indebted to him in the sum of one thousand dollars for money borrowed by her of him, which money was used in the construction of the hotel on said lot, and that the deed was executed and delivered to said Patrick as a security for said indebtedness; that she had subsequently paid the indebtedness in full, and Patrick had reconveyed the premises to her as the real and lawful owner thereof; that while the deed was executed upon the date named, Patrick O'Hanlan retained the possession thereof, and did not deliver it to the said Margaret until the full payment of the said sum of one thousand dollars, which had been borrowed of him by her, and that upon said payment being made in full, the deed was delivered to her, and by her placed upon the records of the county.

The reply consisted of a general denial. The cause was tried to the district court, which resulted in a general finding in favor of defendants and a decree dismissing plaintiff's petition. From this decree plaintiff appeals.

The questions decided by the district court were almost exclusively questions of fact, and upon testimony somewhat contradictory, and we are unable to see how we can molest the decree. If it was true, as contended by defendant, that at the time of the marriage of Peter and Margaret O'Hanlan, she was possessed of five hundred dollars in money, and that the same was never delivered to him to be used by him as his own, but to be returned to her, and at the time of the purchase of the property in Chadron, this money had all been repaid, and the purchase was made with the same funds, the purpose at the time being to take the title to the property in her name, and that with her own means she had made the improvements upon the property by which it had become valuable, the decree of the district court was correct. This of course was not conceded by plaintiff; and while there are some features about the case which render the theory presented by defendants somewhat improbable, yet we cannot say that there was not sufficient to sustain the finding of the court.

We have examined all the evidence in the case; but it would serve no good purpose to state it here. Defendants Margaret and Peter both took the stand and testified fully as to the alleged separate money of Margaret used in the purchase and improvement of the property involved in the suit. They were then subjected to an unusually searching and skillful cross-examination, but they, with at least some indications of truth, adhered to the statements made in their examination in chief. These might be briefly stated to be, that at the time of their marriage, about twenty years ago, Margaret had of her own private means the sum of five hundred dollars, which, by her consent, was used by her husband; but it seems to have been the purpose during the whole of the time that she should remain the owner of this money; that is, that it should be returned to her. Peter O'Hanlan finally purchased from plaintiff a hotel property in Iowa, making such payment thereon as to leave about

the sum of fifteen hundred dollars unpaid, and for the security of which he executed to plaintiff a mortgage on the property so purchased. The house was insured for the sum of two thousand dollars. It was finally burned, and with it substantially all the household property owned by defendant. Fourteen hundred dollars were realized from the insurance. One thousand dollars of this with the interest thereon was paid to plaintiff. The remainder was used in the payment of other indebtedness. At the time of the destruction of the hotel, Peter O'Hanlan was in possession of some personal property and a private residence, valued at about seven hundred dollars. This property was sold. About the time of the sale, Peter O'Hanlan went to Chadron for the purpose of attending a lot sale and buying property for his wife with her means, she having retained her five hundred dollars out of the proceeds of the property sold in Iowa. On the day of the lot sale in Chadron, he was unable to attend the sale by reason of sickness, and requested his brother to make the purchase of lot twenty, which his brother did, using the money furnished him; but without knowing the purchase was to be made for Margaret O'Hanlan, he made it in the name of Peter, her husband. Margaret subsequently purchased from the owner, lot nineteen. Peter seems to have had nothing to do with this purchase. Subsequent payments were all made by her. The hotel, constructed upon the property with money which she had borrowed, was operated and managed by her without the interference of her husband, and in order to make the necessary improvements, she borrowed six hundred and fifty dollars from Thompson, executing a mortgage on the property to secure the same, which she had paid out of the proceeds of the house. She also borrowed the sum of one thousand dollars from Patrick O'Hanlan, executing the deed hereinbefore mentioned for its security, Patrick declining to receive a mortgage for the reason that at that time the mortgage on the property in favor of Thompson was unpaid.

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There were some circumstances which tended in some degree to disprove the good faith of these transactions, principally upon the part of Peter O'Hanlan, the husband. But it was shown that he was illiterate and evidently did not understand the usual formalities of business.

Upon the whole case, we do not feel that we would be justified in interfering with the decree of the district court, and it is therefore affirmed.

DECREE AFFIRMED.

THE other Judges concur.

T. J. GALLOWAY, PLAINTIFF IN ERROR, V. MAY HICKS,
DEFENDANT IN ERROR.

26	531
50	906

[FILED MAY 31, 1889.]

1. **Negotiable Instruments: OWNERSHIP: EVIDENCE.** In an action by a married woman upon a promissory note payable to "M." H., which initial letter of the given name was the same as the initial letter of her husband, who carried on business by the name of "M." H., the defendant in the suit answered admitting the execution of the note, but denied the ownership of the plaintiff, or that the note was executed to her, but alleged that it was made to the plaintiff's husband without consideration. The plaintiff and her husband both took the witness stand and testified that the note was executed and delivered to the wife personally, and that the husband had never owned it. The husband was asked upon cross-examination if he had not, at a certain time and place, had the note in his possession, and offered to trade it to a person named, saying at the time that it belonged to him. An objection to the question on the ground of immateriality was sustained. *Held*, Error, upon the ground that the statement and offer, if made, were inconsistent with his testimony in chief, and, if unexplained by him, might properly be considered by the jury as tending to diminish the weight of his evidence.

2. ———: ———: ———. Where in such case the court instructed the jury that the defendant by his answer alleged that the note upon which the action was brought, was executed and delivered "to the plaintiff" as an accommodation note, and for the only purpose of enabling "plaintiff" to procure credit, etc., it was *held*, that the instruction was erroneous as a misstatement of the issues in the case, the allegation of the answer being that the note was made to the husband of the plaintiff and not to her, her ownership and title being denied.
3. ———: INSTRUCTIONS TO JURY. Where in such case the jury were instructed that if they found that the defendant had not proved the failure of consideration as alleged in his answer, they should find for the plaintiff, *held*, error, as substantially withdrawing from the jury the other issues involved in the case.

ERROR to the district court for Hayes county. Tried below before COCHRAN, J.

J. Byron Jennings, for plaintiff in error.

R. B. Likes, for defendant in error.

REESE, CH. J.

This action was founded upon a promissory note and an account for board, and was instituted before a justice of the peace in Hayes county; and after judgment had been rendered by the justice of the peace, the cause was appealed to the district court.

In that court defendant in error filed her petition, in which she alleged the execution and delivery of the note by plaintiff in error to her, its maturity, non-payment, etc. As a second cause of action, she alleged that the plaintiff in error was indebted to her in the sum of \$2 for board. The action was instituted in the name of M. Hicks. The note which constituted the principal demand was as follows:

"\$76.80.

DECEMBER 2, 1885.

"Thirty days after date, I promise to pay to the order of M. Hicks, seventy-six and $\frac{80}{100}$ dollars, for value received,

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negotiable and payable without defalcation or discount, and with interest from date at the rate of 10 per cent per annum, until paid. T. J. GALLOWAY."

Plaintiff in error filed his answer, in which he admitted the execution of the note, but alleged that it was executed and delivered to Martin Hicks, the husband of defendant in error, and not to her; that it was wholly without consideration, and given only as an accommodation to Martin Hicks in order that he might use it as a collateral security to his own note, and upon the payment of the principal note, it was to be returned to him. The title and ownership of defendant in error was also denied, as well as all other allegations of the petition not admitted.

The reply consisted of a general denial of the allegations of the answer, and an affirmative averment that at the time of the execution of the note, and before its delivery, defendant in error and plaintiff ran over their accounts together, ascertained the amount due defendant in error for board, and upon a full settlement to the satisfaction of plaintiff in error, he executed and delivered to her the note in question.

A jury trial was had, in which the evidence upon either side was presented. It would be difficult to imagine a case where the evidence could be more contradictory and conflicting than the one presented to the jury. The conclusion is forced upon us that the conflict is not entirely the result of an honest misunderstanding; and for the purpose of arriving at the truth, considerable latitude, within proper and legal bounds, would have to be given to the investigation of such collateral facts as might throw light on the principal transaction. The record is full of exceptions to the ruling of the court, in excluding testimony offered, taken by the attorney for plaintiff in error on the trial, but as no offer of proof was tendered, we cannot decide whether the court erred or not.

As will be seen by the issues formed, the turning point

in the case was whether the note was executed and delivered to Martin Hicks, or May Hicks his wife. Martin Hicks took the stand for his wife and testified that the note was executed and delivered to her. Upon his cross-examination the following question was asked :

"Did you not, about the 1st of February, 1886, take this note I have in my hand and go to A. L. West in this county, I think in this town of Hayes Centre, and say to him that you wanted to sell him this note, or trade it to him for a horse, and did you not at that time tell him you were the owner of the note?"

To this question an objection was made as being immaterial matter, which objection was sustained, and to which plaintiff in error excepted. Again he was asked the following question :

"Did you not have it in your possession and offer to trade it to West for a horse at that time?"

To this question objection was made as immaterial, which objection was sustained, and to which plaintiff in error excepted.

We think these questions were proper upon cross-examination, and that an answer thereto should have been required. If the offer and statement were made by him, they were somewhat inconsistent with his testimony upon the witness stand, and if unexplained would have been proper to be considered by the jury as tending to diminish the weight of his evidence.

Upon the trial the following, among other instructions, were given to the jury, to which plaintiff in error excepted at the time :

"2. The defendant T. J. Galloway for answer to plaintiff's petition alleges that the note described in plaintiff's petition was executed and delivered to the plaintiff as an accommodation note, and for the only purpose of enabling plaintiff to secure credit, and for no consideration whatever from the plaintiff to the defendant.

"3. You are further instructed that in order to entitle the defendant to recovery in this action, it is incumbent upon the defendant to prove by a fair preponderance of testimony that the note was made and executed and delivered by the defendant to the plaintiff without any consideration whatever, and solely for accommodation of the plaintiff.

"4. The court instructs the jury that the note sued on in this case is *prima facie* evidence of an honest indebtedness from defendant to the plaintiff, at the time the note was made and delivered; and if you believe from the evidence that defendant has established, by a fair preponderance of the evidence, that the said note was given without consideration, then you should allow the defendant in this suit credit for the amount of said note, principal and interest; that when in a suit upon a promissory note defendant sets up a failure of any consideration for the note, he must establish such failure by a fair preponderance of the testimony; and in this suit if the jury find that defendant has not proved the failure of the consideration as alleged in his answer, by a fair preponderance of the evidence, it should find for the plaintiff for the full face of the note and interest."

In the second of the above instructions quoted, the court seems to have inadvertently fallen into the idea that by the answer, it was alleged that the note was delivered to the plaintiff as an accommodation note, when in fact it was clearly alleged in the answer that the note was given to Martin Hicks, and not to the plaintiff. This was no doubt an oversight on the part of the learned judge who gave the instruction; but nevertheless the jury must have been misled thereby as to the real issue involved. By the third instruction the jury were informed that the burden of proof was upon plaintiff in error to prove by a preponderance of evidence that he delivered the note to the plaintiff without consideration, and solely for her accommodation. This, as we have seen, was not in issue. By the latter

portion of the fourth instruction, the court informed the jury that if they found that plaintiff in error had not proved the failure of the consideration, as alleged in his answer, by a fair preponderance of the evidence, they should find for the plaintiff in the action, for the full face of the note, and the interest. This instruction here ignores other and perhaps fundamental issues as to the ownership of the note by defendant in error. It substantially told the jury that if they found the note was sustained by sufficient consideration, they should find for defendant in error. In this the court erred. There were two issues presented: first, as to the title or ownership of the note by defendant in error; and second, as to the consideration therefor. Both questions should have been submitted with the instruction that if they found the first in favor of defendant in the action, they should give no further attention to the second, as that would be decisive of the case so far as the note was concerned. It may be a question as to where the burden of proof rested as to the ownership of the note; but upon this question, as it is not before us, we express no opinion.

The judgment of the district court is therefore reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

THE other Judges concur.

ELIJAH FILLEY, PLAINTIFF IN ERROR, V. WILBURN
BILLINGS, DEFENDANT IN ERROR.

[FILED MAY 31, 1889.]

1. **Evidence: FALSE WEIGHTS AND MEASURES.** In an action by B., who was the owner and vendor of certain beef cattle and fat hogs, against F., the purchaser of said cattle and hogs, for falsely weighing the same and refusing to correctly weigh and give the true weight thereof, to the plaintiff's damage, upon the evidence, facts, and circumstances, set out at length in the opinion, *held*, that the opinion of witnesses of long experience in raising, feeding, handling, and weighing, cattle and hogs, was admissible in evidence, for the purpose of establishing the falsity of such weight.
2. **Evidence examined, and *held*, to sustain the verdict.**

ERROR to the district court for Gage county. Tried below before APPELGET, J.

L. W. Colby, for plaintiff in error, cited: *B. & M. R. R. Co. et al. v. Beebe*, 14 Neb. 463; *Oakes v. Weston*, 45 Vt. 430; *Cook v. Brockway*, 21 Barb. 331; *B. & M. R. R. Co. v. Schluntz*, 14 Neb. 421; *Fry v. Bennett*, 3 Bosw. (N. Y.) 200; *Haynie v. Baylor*, 18 Tex. 498.

A. Hardy, for defendant in error, cited: *R. V. R. R. v. Arnold*, 13 Neb. 488; Wharton on Evidence, sec. 573.

COBB, J.

This cause was before this court at a former term on error to a former trial in the district court of Gage county. The judgment below, then, for the defendant, was reversed, and the cause remanded. The opinion is published in the 21st volume of our Reports, at pp. 511-25. Upon the second trial in the district court, a verdict and judgment were rendered for the plaintiff, and the cause is now brought forward again, on error, by the defendant.

Plaintiff in error, in his brief, presents fifteen points, which will be noticed separately or by convenient groups.

I. The plaintiff, being on the stand as a witness in his own behalf, after having stated the facts and circumstances of the sale by him to the defendant, of forty-two marketable steers, and a hundred and one fat hogs, testified that at the request of the defendant the hogs and steers should be delivered at his place and weighed, ready for shipment; some ten days earlier than had been originally intended, the cattle and hogs were driven to defendant's place of business. The examination and testimony of plaintiff were continued as follows:

Q. Now, after they were all driven up, the cattle and the hogs, where were they weighed?

A. They were weighed on those cattle scales.

Q. How many cattle were weighed?

A. Forty-two steers that day.

Q. How many hogs?

A. It appears to me one hundred and one hogs, as well as I remember.

Q. Who weighed them?

A. Mr. Filley.

Q. How were these scales situated as to standing, north and south, or east and west, lengthwise?

A. I think the cattle went, as well as I mind now, on the south side, and were driven out on the north or west side. I would not say which.

Q. Which side did they go in at?

A. On the south side.

Q. After they were driven in, state what position would they take.

A. Like all cattle driven in, they would beat back against the back side of the scales as much as possible, and crowd backward and forward.

Q. What transpired during the weighing of that stock that day?

Filley v. Billings.

A. When they went in they were driven in, and there was a board out on the north side of the cattle scales, up about as high as a steer's head, and when they were driven in they bulged up against that side, and I thought they were going to break out, maybe—run their heads through and break out. And there was a young man there who helped drive them up—Alva Lamb;—and when they acted like breaking out I told him to go and punch them back. Filley was weighing, and when he punched them back, the beam went up, and I said, "Filley, the scales are not right; and when they go to the south side the beam goes up, and when they come back the beam goes down." He said they were right; it was the wind. I said I didn't think the wind could make two or three thousand pounds difference. I told him they moved up and down as they went back and forward. We weighed them and drove them off; I noticed every draft; if they beat back south the beam would go up, and when they went north it would go down. I told him a good many times they were not right, and he said they were right, and kept flying out of humor, saying the scales were all right. I knew in my own mind they were not all right.

Q. How long have you had experience with cattle?

A. I have had experience with cattle for eight or ten years; ten, or twelve, or fourteen years, more or less, to no big extent.

Q. Have you fed cattle?

A. I have fed cows, and some steers once in a while.

Q. You have seen them weighed?

A. Yes, a good deal.

Q. State whether or not at that time you thought your cattle—what your opinion was as to whether your cattle were weighing near as much as they ought to or not.

Over the defendant's objection plaintiff answered, "Why, my opinion was they were not weighing near what they ought to; I saw that." * * *

Q. And *then* what was weighed?

A. We weighed the bull separately; we weighed the hogs then.

Q. Have you handled hogs a good deal?

A. Yes.

Q. And seen them weighed?

A. Yes.

Q. Have you fed them and weighed them?

A. Yes, for thirty years.

Q. You may state if you noticed anything in regard to the scales while he was weighing the hogs.

A. I don't know as I did; only I knew the hogs were not weighing by one-fourth as much as they ought to; that is all.

On defendant's objection, the above answer was stricken out as not responsive, and as immaterial, irrelevant, and incompetent.

Q. I will ask you what your opinion was as to whether your hogs were weighing as much as they ought to weigh or not, on those scales?

Over the objection of the defendant, plaintiff answered: No, I was certain they were not weighing as much as they ought to.

Q. By how much?

Over the objection of the defendant, plaintiff answered: I don't think they weighed by one-fourth as much as they ought to, at all.

Plaintiff further testified that he was dissatisfied as to the weight of the stock, but could not get Filley to examine the scales; he would not talk anything about it; he had bought on them, and sold on them, and knew they were right; he would not talk about it, or examine them; that plaintiff got defendant to weigh him, first on one end of the scales, then on the other; that he weighed twenty pounds more on the south end than on the north end of the platform; that defendant accounted for this by saying it was "the wind;"

that after that they settled up, defendant paying him agreeably to the weight of the stock as then weighed; that he asked defendant what he would give him for twenty hogs left in his pen at home; that they agreed upon a price, and plaintiff delivered the hogs the next day; that at the time of the delivery he found that defendant was not at home, but that Mr. Baughman, in defendant's employ, was there attending to business for him; plaintiff asked Baughman if he would weigh the hogs, and he went and balanced the scales, and plaintiff drove on eleven hogs and weighed them; then eight more, (one having been sold *per caput*, and not by weight;) that after weighing the eight hogs on one end of the scales, they were driven to the other end, and weighed again, and were found to weigh 225 pounds more than at the first; that plaintiff and Baughman then tried to ascertain the cause of the difference in weight on the opposite ends of the platform; that while they were engaged in clearing out the mud between the sills and the frame, with a spade and shingle, and testing the scales by driving the hogs and weighing them, from one end of the scales to the other, and noting the same difference in weight, the defendant returned and joined them in the search; that they then weighed a boy on the scales, and sent him, with another boy, to the scales at the railroad depot, to be weighed there; that the boys returned, and the one reported that he weighed thirty pounds more on the depot scales than at the defendant's scales; that they then drove the eight hogs last weighed up to the office scales, and weighed them there; that there was a difference in weight at the office or grain scales of 200 and odd pounds more than that of one end of the cattle scales, and of 480 pounds over the other end; that the hogs weighed the most on the grain scales — weighed 480 pounds, to the best of plaintiff's recollection, more than they did on the north end of the cattle scales, and 200 and some odd pounds more than they did on the south end; that plaintiff then said to defendant that "he wanted all

of his stock weighed over;" that defendant said that he could not weigh it over; that he was not fixed to weigh it over again; that between them "there was right smart talk about weighing it over, one way and another;" that plaintiff said to defendant that he had cheated him out of \$1,000, the day before, in weighing that stock on those scales; that defendant replied that he could not have cheated him out of \$1,000, as there was not stock enough for that; that the defendant then figured up in his book what the difference would be in the weight of the hogs, and that of the stock weighed the day before; that plaintiff did not look at his figures to see, and wouldn't have known if he had; that defendant said it would have made a difference of \$225; that then a young man named Miller, and another named Alva Lamb, counted it up, and Miller said that the difference was \$1,000 and three or four dollars; that defendant then proposed that plaintiff should take the \$225 and not weigh the stock over; that plaintiff said that he would rather have it weighed again. Defendant insisted that he was not fixed to have it weighed, but would give plaintiff the \$225 to say nothing more about it. Plaintiff told him that he was not satisfied about that, and proposed to take the stock somewhere else and weigh it. Defendant said, at last, that he would fix the scales and weigh it over, and weigh it right, if plaintiff would shrink the cattle one per cent, and allow him \$25. Plaintiff told him if he wanted to do what was right, he would not want anything; he replied that it would injure the steers to drive them around, and he didn't want to do it. Plaintiff then said if defendant would weigh the stock over, and weigh it right, he would give him the \$25, and shrink the cattle one per cent, which was agreed to, and plaintiff told him to go ahead.

The plaintiff's testimony was continued:

Q. What did you understand he was to weigh over?

A. The cattle and the hogs.

Q. Was that the stock you delivered the day before under the written contract?

A. Yes.

The plaintiff further testified that the defendant then went and tore the stock scales down and moved it up where they weighed the stock the day before, close to his office; he tore the frames away from that, and put them on the grain scales, around the scales; he set it on the solid sills of the wagon scales, (he called it,) and spiked it above on the studding, and fixed a gate at each end to drive the cattle in on it, then drove the cattle in and weighed them, forty-one head. The plaintiff described the manner in which the cattle were driven on and off the scales, and weighed, which is not deemed important to report, but was substantially that sometimes three got in on the platform, side by side, two on either side of the platform and one in the middle; that he didn't notice all the time, as he was down where Filley was weighing and could not watch both places at once; but generally two or three steers were together, side by side, crowding in pretty tight and standing at the edge; that they had to, when three went in, press very tight against the cattle rack; the boys standing round kept them from bursting out while he was weighing them. The plaintiff further testified:

Q. Do you know how much these forty-one that he weighed that day weighed in comparison to the forty-two that he weighed before in the way you have described?

A. I had it down.

Q. Did they weigh more or less?

A. I think they weighed a little more; some forty pounds, I think it was.

Q. Why didn't he weigh the forty-two steers?

A. There was something wrong with that one steer. When we drove him out, he fell. He was a wide-horned steer, and threw himself over and hurt his neck; I thought he had broken it; but he got up and went to the yard. I think he fell on the scales that day; but he got up and went with the cattle into the yard.

Q. Where did you leave that steer?

A. With Mr. Filley.

Q. How much was its weight?

A. Filley and Post guessed it at 1,050 pounds.

Q. Have you heard what Filley stated had become of it?

A. Only as he testified.

Q. What did he say?

A. That Chicago parties took him off, I think.

Q. After the weighing of the steers that day, what occurred about the hogs?

A. We went down into the lot and drove the steers up — me and some of the boys. Filley said something to the effect that he would not weigh the hogs over, or could not. There was nothing more said about the hogs until he got the cattle weighed, and then he said he could not weigh the hogs over; they were among his other hogs; or something to that effect.

Q. Were the hogs ever weighed over, to your knowledge?

A. Not that I know of.

Q. After the weighing, this second day, what occurred between you and Filley — state what he did with regard to paying you?

A. We took out \$25 for weighing the stock, and the shrinkage of the steers, I think one per cent.

Q. Do you remember how much that was?

A. It was fifty some odd dollars; it appears to me it was \$57. I cannot say for certain, but I think that was it.

Q. You cannot read or write?

A. No, sir. I had the figures, but I could not tell anything about that; I did know, but I don't recollect. That is as near as I can come at it.

Q. State whether or not, after taking out the \$25 for re-weighing, and one per cent for shrinkage, there was anything coming to you for the last hogs you drove there, the nineteen last weighed.

Fillee v. Billings.

A. Yes, there was some money coming; I forget what it was; but whatever it was he paid me agreeably to weighing the last hogs after taking out the fifty odd dollars.

Q. What became of the forty-second steer? Was that counted in when he settled with you the second day?

A. No, there was nothing said about it. Fillee proposed several times my taking it away and my putting it on the butchers'; but I had no idea of taking him, so I don't think there was much said about it.

Q. He was never accounted for, and you never had your pay for that steer?

A. No.

Q. Has he ever paid you anything more or further for this stock?

A. No, he never paid anything for it after what he paid then; agreeable to the weight the first day is all I got, only he took out some out of the hogs for weighing over.

Q. The forty-one steers the second day weighed a trifle more than the forty-two did the day before?

A. That is my recollection; it appears to me it was forty pounds more, but would not say exactly.

Q. State who went with you the first day to help you drive the cattle and hogs up there?

A. Winneger was present, and took the weight of the cattle and hogs; I hadn't any learning, and told him to take the weight down, and he did so. Alva Lamb was present, and I think he took the weights down, also John Miller, and Bill McGrady; there were several there when we weighed the cattle and hogs; I think Charles Treavis was by.

Q. Who was present at the weighing by Baughman and Fillee?

A. Alva Lamb and Bill McGrady were by.

Q. Do you know if anything was weighed on those cattle scales of Fillee's after he weighed the stock the first day, before he weighed the nineteen hogs the second day?

A. I don't know; I can't say anything only hearsay.

Q. Have you heard Filley or Baughman, his agent, say?

A. I heard Baughman state there was nothing weighed from the time the cattle was weighed, the day before my hogs were weighed.

The first error argued by the counsel of plaintiff in error is that arising upon the overruling by the court of his objections to the questions set out in the above quotation of testimony. There can be no doubt of the correctness of the counsel's proposition as a general rule. Where questions of damages are to be submitted to a jury, witnesses will not be allowed to state their opinion of the amount of such damages; and the same principle is applicable to many other cases of like import. That rule, however, is not conceived to be applicable to the question under consideration. One of the allegations of the petition is that the defendant's scales, upon which he weighed said stock, were grossly incorrect and wrong, and did not give weight of the stock to at least twenty-five per cent, making the value thereof at least twenty-five per cent of the weight too low. This allegation presented a question of fact, to be proved by the best evidence available. It may be conceded that had the cattle and hogs been under the plaintiff's control, with scales of acknowledged accuracy accessible, for the purpose of weighing, at the time and place of the controversy as to the weight of the stock, the rule which requires the best evidence would have obliged him to have reweighed the stock upon such scales, and to have given the result in evidence, on the trial, to the exclusion of the opinion of witnesses; but the facts, as testified to, leave it clear that the stock had passed beyond his control, and that the defendant would not consent to its being taken elsewhere for reweighing; nor does it appear that scales of acknowledged accuracy were then accessible to the plaintiff. The point is thus brought within the rule laid down in Wharton's Law of Evidence, vol. 1, sec. 511, as follows:

"*A fortiori*, whenever a condition of things is such that it cannot be reproduced and made palpable in the concrete to the jury, or when language is not adequate to such realization, then a witness may describe it by its effect on his mind, even though such effect be opinion." And again, in sec. 513, the same authority says: "In fine, in addition to the rule already given that opinion is admissible when it is fact in short-hand, it is not necessary for a witness to be an expert to enable him to give his opinion."

By referring to the evidence quoted, it will be seen that the plaintiff stated the peculiar facts in connection with the weighing of the stock; how that the stock weighed a great deal more when standing on the south end of the scales, or platform, than when weighed on the north end. The fact that a certain number weighed materially more, as indicated by the test of the scales, when standing on one end of the platform of the scales than when standing on the other, would of itself show that the scales were not right, and did not weigh with unvarying accuracy; but it would not show, nor even tend to prove, which of the two weights was the true one—whether the stock was made to weigh too little on the one end, or too much on the other—and in the absence of accurate and reliable means of determining, the opinion of witnesses of experience and sound judgment would be the best available evidence of the true weight of the stock.

II. The second point arises upon the alleged error of the court in admitting certain testimony of A. L. Stanhope as a witness for the plaintiff. All that need be said is that this point is identical with the question just considered.

III. The third point is that the court erred in sustaining the plaintiff's objection to question 672 of the cross-examination, by defendant, of the witness Baughman. By referring to the bill of exceptions, it is found that question 672 was not put to Baughman, but to Alva Lamb, by plaintiff's counsel; was objected to, by defendant, as lead-

ing and improper, and the objection was sustained. The error is probably in the counsel's brief, and will not be further considered here.

IV. The fourth point is that the court erred in sustaining the objection of the plaintiff to question 1149, on the examination of the defendant. It appears, from the bill of exceptions, that the defendant was called and sworn as a witness on his own behalf. After testifying to weighing the cattle and hogs, he stated that "the plaintiff asked him in regard to the scales, if they were correct; that witness told him they were correct, and he thought not, and got on the scales and was weighed."

Q. State what the result was of his idea.

A. He was weighed two different times, I think, on the scales, and there was some five or ten pounds' difference in his weight.

Q. State what that indicated on scales of that size.

This question was objected to by plaintiff's counsel as incompetent, and immaterial to the issue, the objection being sustained by the court. It will be sufficient to say, of this point, that there was no offer made of this testimony, nor any indication of what was expected to be proved prior to its being introduced; and it has been held, frequently, that in order to avail himself of error in the rejection of evidence, the party must have made an offer of the testimony, clearly presenting what he expected to prove. (*Matthews v. The State*, 19 Neb. 338; *Masters v. Marsh*, Id. 462; *Lipscomb v. Lyon*, Id. 522.)

V. Under this head the plaintiff in error claims that the court erred in sustaining the objections of the plaintiff below to certain interrogatories, forty-six in all, in different parts of the record. I have examined each of these rulings separately; but it is not deemed important to detail each in this opinion, as the exigencies of the case do not seem to require it, and there appears to be no reversible error involved. The plaintiff offered in evidence a portion

of the record of the former trial, embracing question 1437, and the answer set out in the bill of exceptions; also the certificate of the trial judge, to the bill of exceptions, that it contained all the evidence offered on the trial, which were admitted over the objections of defendant.

Upon the admission of this evidence the plaintiff in error places the sixth point of his brief. He states the point merely, and fails to show wherein the record is prejudicial to him; and I see no reason why it should be so regarded.

It would seem to be an accepted proposition that the record of a former trial, in the same case, between the same parties, was admissible as evidence, and in the absence of authorities or argument to the contrary, it will be so held.

The seventh, eighth, ninth, tenth, eleventh, and twelfth, points arise upon the second, third, fourth, fifth, sixth, and eighth, instructions to the jury, asked by the plaintiff and given by the court as follows:

"II—The court instructs the jury that the plaintiff was legally entitled to have his stock weighed correctly. Hence, if the jury find from the evidence that such stock was weighed incorrectly, it was the duty of defendant to correctly reweigh the same, and he could not charge the plaintiff \$25 or any other sum for the trouble of such reweighing; and plaintiff's agreement to pay for such reweighing was void, and if defendant retained or received anything whatever from plaintiff, for such reweighing, even though by plaintiff's consent, the latter is entitled to recover such amount in this action.

"III—That the plaintiff was legally entitled to have his stock weighed correctly at the time of its delivery to defendant. Hence, if the jury find from the evidence that said stock was weighed incorrectly, it was the duty of the defendant to reweigh the same without allowance for his trouble, and he could not, even though the plaintiff in order to secure such reweighing agreed thereto, increase the

shrinkage above the amount originally agreed upon between the parties. And if the defendant, as a consideration to such reweighing, exacted from the plaintiff, whether with or without the latter's consent, one additional per cent, or any other amount, from the weight of plaintiff's cattle, over and above the amount originally agreed upon between the parties, then the plaintiff is entitled to recover in this action for the full amount of such additional deduction, unless the jury shall further find that the incorrection, if one existed, was a mutual and honest and unintentional mistake of the parties, and further, that said shrinkage was no more than would take place under the circumstances.

"IV—That the plaintiff was entitled to have his stock, both cattle and hogs, correctly weighed when he had delivered the same to the defendant, and if the defendant, at said delivery, incorrectly weighed said stock, or gave the plaintiff incorrect weights of the same, if said incorrect weights were less than the true weights thereof, it will be their duty to give to plaintiff in this action a sum equal to the amount which he lost by reason of such incorrect weights, such sum to be based upon the original price to be paid for said stock.

"V—That if they find from the evidence that the plaintiff's stock was weighed, when delivered to defendant, upon scales which did not weigh correctly, then, if they further find from the evidence, that upon the next day a number of hogs were weighed upon said defective scales and at once reweighed upon correct scales, then the jury are authorized to take the difference between the false and true weights of such hogs as a basis upon which to ascertain the true weight of plaintiff's stock so incorrectly weighed when delivered: *Provided*, The jury further believe, from the evidence, that the defective scales were in the same condition when the hogs were weighed as they were the day before when the plaintiff's cattle and other hogs were weighed.

"VI—That any sum less than the amount the plaintiff

was entitled to receive for his stock by the terms of the contract, which plaintiff may have received from defendant therefor, if plaintiff took the same for the purpose of getting what he could while it was offered, without abandoning the right to get more when he could, was no settlement, and is no bar to this action, unless the plaintiff expressly agreed to take what he got in full satisfaction for his stock."

"VIII.—That if they find from the evidence that the defendant agreed to reweigh all of plaintiff's stock, both cattle and hogs, and was to have from plaintiff \$25, and to shrink the cattle one additional per cent for such reweighing, and if they further find from the evidence that pursuant to this agreement the defendant did reweigh forty-one steers, and refused to weigh the hogs that he was to reweigh, then the defendant was entitled to no compensation for the reweighing of the forty-one steers, and any money that he withheld from the plaintiff for such reweighing, he is liable to the plaintiff for in this action, unless the jury shall further find from the evidence that said \$25 was taken and deducted for the injury that it would do the cattle weighed, and not for the labor and trouble of such reweighing."

The material objections to these instructions were fully answered by the court in its opinion in the case as formerly presented in the Report, 21 Neb. 511, in which the Chief Justice, MAXWELL, says: "The defendant was to pay the plaintiff \$5.35 per hundred for the steers, and \$6 per hundred for the hogs. These prices were for the actual weight of the stock so delivered, and when it was found that the scales were incorrect, the plaintiff was entitled to have the stock weighed correctly, and this without payment of any consideration. Until the stock had been weighed correctly, it had not, so far as the rights of the seller were concerned, been weighed; that is, the fraudulent or incorrect weighing of the stock was not a weighing within the meaning of

the contract. The \$25, therefore, which the plaintiff agreed to pay the defendant, was a mere gratuitous promise and for which he received no consideration."

In addition to what was held on the former trial, I will add that according to the contract of sale, which is made a part of the plaintiff's petition, and admitted by the defendant's answer, the stock should be weighed *at Filley*. This agreement, viewed in the light of all the evidence, I deem to be equivalent to, and to be, in fact, an agreement on the part of defendant that upon the stock being driven to his place, on the day of delivery, he would weigh it. This important part of the contract was not fulfilled until all the stock was fairly and honestly weighed. Until that was complete, the plaintiff had a right, not only under the contract, but by the rule and custom of trade, that the same should be fairly and honestly weighed, he giving friendly assistance, by himself and employés, and the same fairly and honestly stated to him. The instructions of the court, above quoted, amount to this, and no more. The fifth instruction, however, provides that if the jury shall find that the stock was weighed, when delivered to defendant, upon scales which did not weigh correctly, and if they shall further find that on the next day a number of hogs were weighed upon the defective scales and at once reweighed upon correct scales, then they were authorized to consider the difference between the false and the true weights of the hogs as a basis from which to ascertain the true weight of plaintiff's stock, provided they should also find that the defective scales were in the same condition, when the hogs were weighed, as on the day before, when the plaintiff's cattle and other hogs were weighed. Counsel objects to this instruction on the ground that it usurps the province of the jury by finding that there were false and true weights in the transaction. I do not so understand the instruction, but think that it sufficiently leaves it to the jury to find from the evidence whether the scales upon which the stock

was weighed the first day were true scales, and gave true weights; and whether those upon which the hogs were weighed on the second day were true scales and gave true weights. Not only so, but I think the court, by this instruction, presented to the jury a correct, if not the only correct, theory and test upon which to come to a solution of the issues presented by the pleadings and established by the evidence in the case.

Counsel specially objects to the sixth instruction for that it does not require the jury to believe from the evidence the facts assumed. As I understand this instruction, it simply states a principle of law, and does not instruct the jury how to find in one event or another; neither does it assume any facts. Hence there was no occasion that it should be predicated upon what the jury *should believe from the evidence*.

Counsel also especially objects to the eighth instruction, for the reason that the excepting clause refers only to the \$25, and does not mention the one per cent shrinkage. From a careful examination of defendant's testimony, I think it very doubtful that the evidence, as to the ground upon which the defendant claimed the additional one per cent shrinkage, was to compensate for the possible damage to the cattle by reweighing them; but were there no doubt on this point, while the failure of the court to include that in the exception might be regarded as an oversight, I would still not regard it as of sufficient importance to control or to influence the trial of the case.

Under the eighth assignment of error it is argued that the verdict is contrary to the evidence, and to establish this point the plaintiff in error calls attention to the fact that the evidence shows that when the cattle were weighed, on the first day, they had been driven from a distance of about five miles, and had remained standing an hour without food or water, before weighing, and were then turned into the feeding lots of defendant, and were allowed to fill up on an abundance of water, corn, and hay, for twenty-four hours,

before the second weighing. This fact, it is argued, would account for the difference in the weight, even had both tests been correct. These facts and all the circumstances were doubtless present, and considered in the minds of the jury, and had their full weight in bringing them to the conclusions of the verdict.

The fourteenth assignment calls attention to what is claimed to be a material error in the admission of evidence in regard to the black sow and the crazy steer. There is a black sow mentioned by witnesses on either side, which evidence was received without objection. It appears that the sow was bought by Filley from Billings at the gross price of \$20, regardless of weight. She was driven to the scales and weighed with nineteen others on the second day, but was subsequently reweighed and her weight taken out of the gross weight of the lot, so that I do not see that there is a probability that the jury gave any undue importance to the presence and position of the sow in the evidence. As to the crazy steer, he was sufficiently considered in the former opinion referred to, and is assigned his status in that report, and will not again be disturbed.

Finally, under the fifteenth subdivision of the brief, attention is called to the fact, as alleged, that the case was not tried on the pleadings at all, but on new issues made by the evidence; that plaintiff claims in his petition that Filley refused to and did not reweigh the stock; that which he did reweigh was incorrectly done, and that, taking this to be true, there was no correct weighing whatever, and nothing for the jury to base their findings upon. There is a mass of testimony taken, running through more than 200 pages, but I think it is chiefly confined to the issues presented by the pleadings — the incorrect weighing of the stock. In addition to that quoted and referred to, I will mention that of several witnesses, on either side, to the fact that, after the weighing on the first day, and the attempt to weigh the hogs by Billings and Baughman on the second day, and the

admission by Filley that there then seemed to be something wrong in the cattle scales, and the taking off of the rack or fencing about the scales, and removing it to the grain scales, an adjusted piece of pine scantling was discovered under the north end of the platform of the cattle scales, upon which the platform and scales in some degree combined and rested, and which doubtless was considered by the jury as sufficiently condemning the integrity of the original weight of the stock. There is also evidence tending to prove that the fencing was set up around the grain scales in such manner, and the cattle crowded in upon the platform, at the second weighing, so as to prevent their entire weight from resting upon the scales; and thus in a considerable degree depreciating the value of the second weighing; and it is admitted that there was no pretense of reweighing the hogs at any time.

It will be admitted that the testimony to the jury was not such as to enable them to reach conclusions with the same degree of mathematical certainty and logical accuracy that is always desirable in controversies at law. But the comparisons of weight between that of the cattle scales, on the first day, and the office scales on the second day, before the objectionable fencing was added to the latter, gave them important data to arrive at the loss in the weight of plaintiff's stock by reason of inaccurate and faulty weighing. To this must be added the testimony of the judgment and opinion of witnesses having experience and knowledge of the questions in controversy, which, as has been shown, was properly admitted on the trial.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

C. W. SHOLES, PLAINTIFF IN ERROR, v. CALVIN A.
KREAMER, DEFENDANT IN ERROR.

[FILED MAY 31, 1889.]

Assumpsit. W., who was temporarily absent, was the owner of a frame building on the lot of an owner who was about to commence an excavation for the purpose of rebuilding, and who had given out his intention to tear the frame building down unless it was immediately removed. S., a friend of W., applied to K., engaged in removing frame buildings, and employed him to remove the building to a designated lot, informing him that he was acting for W., who had a chattel mortgage on the building and was amply able to pay; but that if he did not, he, S., would see that he had his pay. On these terms, K. moved the building to the extent of his contract, and went after W. for his wages; but not finding him at his place of business, and getting no satisfaction for his labor, sued S. as principal. *Held*, That S. was liable.

ERROR to the district court for Lancaster county.
Tried below before HAYWARD, J.

J. S. Gregory, for plaintiff in error.

W. R. Kelly, for defendant in error.

COBB, J.

This action was brought to this court by the petition of the plaintiff in error to review the judgment of the district court of Lancaster county.

The plaintiff below alleged that on the 15th of September, 1885, at the special instance and request of the defendant, he moved a certain frame building from M street, between Eleventh and Twelfth streets, in Lincoln, in said county, to O street, between Nineteenth and Twentieth streets in Lincoln; that subsequently, on the 30th of September following, he presented his account for labor and

services, in moving said building, to the defendant, amounting to \$40.43, which the defendant then and there promised to pay within a reasonable time; that said time has since elapsed and the defendant, though often requested, has not paid the same nor any part thereof; that the said sum of \$40.43 is now due from the defendant on said account for work and labor with interest thereon from September 30, 1885, for which he asks judgment for the principal, interest and costs of suit.

To this the defendant answered that on September 10, 1885, as the agent of George A. Whitcomb and John S. Gregory, he employed the plaintiff to remove a small frame building from lot four of block eighty-eight, in Lincoln, to lot three of block twenty-two of Lavender's addition to Lincoln, for the agreed price of \$30, on the following conditions: The plaintiff to remove said building to lot three without unnecessary delay, in a careful manner, and without needless injury to the building, for the price of \$15 per day for the time actually employed, provided the whole should not exceed \$30 for the job. That on the 20th of September, following, the plaintiff, in pursuance of the contract, removed said building to O street, near said lot three, and there left it in the street, in a warped and unsafe condition, whereby nearly all the plastering from the walls dropped off, and other injuries were suffered, caused by the carelessness and neglect of the plaintiff in not completing his contract, denying each and every allegation of the plaintiff, and alleging that the building was damaged by the plaintiff's neglect to the amount of \$45, and praying judgment for costs.

The plaintiff's replication admits the performance of the work and labor, and avers that he did it at the instance of the defendant, and that the defendant promised to pay for the same as alleged; and denies each and every other allegation of the answer.

There was a trial to the jury with verdict for the plaintiff

for the sum of \$43.26. Whereupon the defendant moved for a new trial, for the reasons:

1. That the verdict is not sustained by sufficient evidence.
2. That it is contrary to law.
3. That it is contrary to the first paragraph of the instructions of the court.

4. That it should have been for the defendant, according to the law and evidence, which, having been argued and considered, was overruled by the court, and judgment rendered for the plaintiff for \$43.26 and \$98.85 costs.

To all of which the defendant excepted, and assigned the following additional causes of error.

5. The court erred in refusing to give the instructions asked by the defendant below.

6. In overruling the motion for a new trial.

On the trial the plaintiff was sworn and examined as a witness, and testified that between the 27th and the latter part of September, 1885, he presented the defendant with a certain account of charges for removing his building, which he kept, a copy of which, marked "A," the witness identified as a copy of the account and the amount; that when witness gave defendant a copy of the account, defendant told witness that he should get in his buggy with him and go down town and get the money; that he said it was all right, there was a man down town that he would get the money from and pay it; that witness went over to the First National Bank in Lincoln with defendant, and he could not find his man that he wanted, and they went to several stores looking for him and did not find the man, and defendant did not pay the account.

That afterward, on the 16th of October, following, witness saw the defendant and had a conversation with him about paying the account; he then told witness to jump in the buggy and go down and he would get the money. Witness went with him, but did not get the money, and he has never paid it since. The plaintiff further testified:

Q. What did he say, if anything, about getting the money?

A. He said he would get the money, or send it to me; one or the other, I am not certain which.

Q. What was the amount of the account?

A. Forty dollars and forty-three cents.

Q. Has the defendant or anybody paid any part of that?

A. No sir.

Cross-examined by Mr. Lansing:

Q. How long have you known the defendant?

A. Since the 14th or 15th of September, 1885.

Q. Did you ever have any other business dealings with him than this for which this suit is brought?

A. No other business.

Q. Did he come to you, or you go to him?

A. He came to me.

Q. When did you commence to move the building?

A. On the 15th day of September, at seven o'clock in the morning; two men, a team and driver, and myself.

The defendant affirmed, and was examined as a witness, and testified that he was acquainted with the plaintiff, who was a witness upon the stand; that he first saw him in the fall of 1885; early in the fall, about the last of September, he should say; that he knew G. H. Whitcomb, and knew the house in question. The defendant further testified:

Q. What conversation had you, if any, with plaintiff relative to the moving of this house?

A. I told him that I had a house that I wanted moved for a man by name of George A. Whitcomb, and that Whitcomb had a chattel mortgage upon it, and I wanted him to move it. He told me he was very busy and couldn't well do it right immediately, but finally agreed to move it.

Q. State the substance of the conversation — what he and you said?

A. I asked him what he would move it for, but told him I was acting as the agent for Whitcomb; that he was able to pay, but if he didn't pay him I would; I would see that he had his pay. He said he would move it, in substance. I asked him what he would charge for moving it; I think he told me that he charged \$15 a day; I am not positive, but I think it would amount to from \$25 to \$30, indefinitely.

Q. What was next said and done?

A. I think he went to moving it. The time was agreed upon when he should commence.

Q. Describe the location of the house relative to where it was to be moved—how far?

A. On M street, adjoining the old Methodist church building between Eleventh and Twelfth streets, to be moved east to Seventeenth and north to O street.

Q. When did you next see the plaintiff?

A. While he was moving it on M street, and on O street street also.

Q. Did you have any conversation at that time with him?

A. It was a little indefinite where we were going to put the building. I think he asked me where, and I was to ascertain and let him know. It was then on O street east of Seventeenth, out about ten feet from the sidewalk; that is the last I saw of him locating the house at that point.

The defendant further testified that he went with the plaintiff to get his pay of Whitcomb, but failed to find him; that he subsequently "told Whitcomb the amount, two or three times over."

It appears from the evidence that on the lot where it was intended the house should be located, there were shade trees of fifteen years' growth and that the plaintiff was without authority to remove them in order to set up the building on the lot at the proper time, which is wholly ascribed to the fault or improvidence of the defendant.

There is the additional testimony of the witnesses Redding, Van Deville, and Ferguson, who were employed by the plaintiff, and were present assisting to move the house, that it was left in as good a condition, without waste or injury, so far as the removal would permit.

The preponderance of evidence in the trial tending clearly to establish the defendant's assumpsit in employing the plaintiff before the work was undertaken, and guaranteeing the payment before it was accomplished, the first, second, fourth, and sixth, assignments in error are overruled.

As to the third error complained of, that the verdict is contrary to the first paragraph of the instructions of the court, it is sufficient to say that, as the instruction is alternative in form and proposition, and the jury found on the weight of evidence for the plaintiff, the instruction was properly given and the verdict ought not to be disturbed.

As to the fifth error assigned, in the court's refusing the defendant's instruction, there was not sufficient warrant in the evidence to the jury that the defendant acted as an agent by the authority and instruction of a principal, or that he employed the plaintiff in that capacity only. Had such been the fact, the instructions of the court already given comprehended that alternative, and were sufficient in that view. The further instructions asked by defendant were therefore properly refused, and the fifth assignment is overruled.

The case having been submitted to the court on briefs of counsel to be decided on the merits of the controversy and claim of the parties, the motion of the defendant in error of January 6, 1888, to dismiss the petition in error because the plaintiff in error failed to file the transcript of proceedings with the petition within one year after judgment in the court below, and the subsequent motion of February 16, 1888, that the plaintiff in error be required to produce an alleged assignment to third parties, of the

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judgment below, will not be further considered; and the judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

JEROME B. WYGANT, APPELLEE, v. JOHN H. DAHL,
APPELLANT.

[FILED MAY 31, 1889.]

1. **Action quia timet: TAXES.** In an action *quia timet*, for the purpose of removing the cloud cast by a tax title, from real property, and to quiet the title in him, it appeared that the plaintiff and those under whom he claimed, had been in the exclusive uninterrupted possession of said land for more than ten years, and that said taxes had accrued and said tax deed been executed more than ten years before the bringing of the action. *Held*, That as the plaintiff sought equitable relief from said taxation and tax deeds, notwithstanding the statute of limitations, he must, as a condition of relief, do equity by paying such taxes and interest.
2. ———: ———: **ATTORNEY'S FEE.** In such action where a decree is rendered upon an answer or cross-petition of a defendant for such taxes, interest, and disbursements, or either of them, an attorney's fee equal to ten per cent thereon will be awarded.
3. **Real Estate: TITLE: MERGER.** Where the general owner of real property receives a deed therefor from a person holding a tax title to said property, the title conveyed by such deed will become merged in the title of such general owner.

APPEAL from the district court for Otoe county. Heard below before CHAPMAN, J.

C. W. Seymour, for appellant, cited: *Dillon v. Merriam*, 22 Neb. 151; Comp. Stat. 1885, p. 580; *State v. S. C. & P. R. R.*, 7 Neb. 376; *Cheney v. Harding*, 21 Id. 68;

26	562
c38	741
38	814
26	562
42	406
26	562
51	468
54	718
26	562
161	152

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Holmes v. Andrews, 16 Id. 298; *Sullivan v. Merriam*, Id. 157; *Shelly v. Towle*, Id. 194.

E. F. Warren, for appellees.

COBB, J.

This case is brought to this court on appeal from the judgment of the district court of Otoe county.

On May 5, 1888, the plaintiff commenced his action alleging that he was then, and for seventeen years past, with those under whom he claimed title, had been, in the peaceable possession of certain real estate in said county, lot number ten, in block number eight, in Nebraska City proper; that his possession had been open, notorious, hostile, and adverse, to all the world, and especially to the claim and title of the defendant, who for seventeen years had exercised no acts of ownership and had not been in possession of any part of said lot; that the plaintiff claims title in fee simple to the same, and that the defendant claims an estate or an interest, adverse to the plaintiff, which is unfounded in law, and is a cloud upon the plaintiff's title, and is derived from deeds executed to the defendant, or his grantors, and recorded in the office of the clerk of said county; that the claim of the defendant is without any right whatever. It is therefore prayed that he be required to set forth the nature of his claim, that all adverse claims to that of the plaintiff be determined, and the cloud upon his title removed, etc.

The answer of the defendant, in the form of a cross-bill, alleges, and sets up, that he is the owner in fee simple of the lot described, and claims title thereto adverse to the plaintiff; that he derives his title from the facts that said lot was subject to taxation for the years 1860, 1862, 1863, and 1864, and was legally assessed for taxation for said years; that the tax for the same was legally levied thereon and was not paid by the plaintiff, but became and remained

delinquent until the sale of said lot for the payment of the delinquent taxes thereon; that said lot was legally advertised for sale for the payment of such delinquent taxes, and was duly offered for sale, and due return was made thereof to the county clerk of said county by the treasurer of said county within the time prescribed by law; that said lot was sold at private sale at the said county treasurer's office for said delinquent taxes to John H. Ahrends, August 17, 1866, who received a certificate of sale, and paid the sum of \$19.44 thereon, and who, on August 18, 1868, for a valuable consideration sold, assigned, and delivered, said certificate to Jacob Shoff. Shoff produced the certificate to the treasurer of the county and received a tax deed for said lot legally attested and acknowledged, and duly filed for record at five o'clock P. M., August 20, 1868, and recorded at the clerk's office of said county, in book "P" of deeds, on pages 495-496. The defendant also alleged that on October 14, 1869, Shoff sold and assigned his title and interest to and in said lot to S. H. Morrison, by a good and sufficient deed therefor; that afterwards, on May 10, 1870, Morrison for a valuable consideration sold and assigned his title and interest in said lot to defendant by a good and sufficient deed therefor. The defendant further alleged that he paid the delinquent taxes on said lot, due for state, city, and county purposes, for the years 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, and 1873, as follows:

January 6, 1869, sidewalk tax.....	\$31 50
December —, 1867, for 1861, 1862, 1864, 1865, and 1866.....	24 30
August 10, 1868, for 1867.....	12 60
December 1, 1868, for 1868.....	13 75
May 31, 1870, for 1869	31 20
April 14, 1871, for 1870.....	50 00
February 27, 1872, for sidewalk tax.....	14 50
March 28, 1872, for 1871.....	30 00
August 4, 1873, for 1872.....	45 00
August 7, 1874, for 1873, on the undivided half of said lot.....	20 70

Total amount of city taxes paid by defendant on said lot..... \$273 55

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And county and state taxes as follows:

November 14, 1867, for the year 1866.....	\$8 58
November 14, 1867, for the year 1867.....	9 67
December 1, 1868, for the year 1868.....	14 40
May 20, 1870, for the year 1869, on the undivided half.....	10 80
April 14, 1871, for the year 1869, on the undivided half.....	11 95
April 14, 1871, for the year 1870.....	16 58
March 29, 1872, for the year 1871.....	15 76
August 4, 1873, for the year 1872.....	34 82
August 7, 1874, for the year 1873, on the undivided half.....	22 91

Total of county and state taxes on said lot for which
receipt was taken..... \$145 47

The defendant alleged that said lot was subject to taxation, was legally assessed for taxes, which were not paid by the plaintiff, but became delinquent for the years 1861, 1862, 1864, 1865, and 1866, and were unpaid after delinquency until the date of sale of the same for taxes, and that the same was legally advertised for sale on that account, at the time and in the manner required by law, and was offered for sale for the taxes for said years; that due return was made thereof to the city clerk of Nebraska City by the treasurer of said city of said lot sold by him at public sale within the time required by law; that the said lot was sold at private sale at the city treasurer's office for said taxes, to Jacob Shoff, December 13, 1867, who received a certificate therefor, and paid the sum of \$24.30 thereon for the years 1861, 1862, 1864, 1865, 1866; that on July 20, 1870, the defendant as assignee of Shoff, surrendered to the city treasurer said certificate and received a tax deed in due form of law therefor, which deed was duly attested and acknowledged, and on the 11th day of August, 1870, was filed for record, at five o'clock P.M., and was duly recorded in the county clerk's office, in book "V" of deeds, pages 128, 129.

The defendant alleged that on July 10, 1870, Jacob Shoff, for a valuable consideration, sold and assigned all his right, title, and interest, in said lot, to defendant, and

made a good and sufficient deed therefor, and avers that he is now the legal owner of the title and interest conveyed in the tax deed aforesaid.

The defendant further alleged, as an additional cause of defense, that more than three years had elapsed from the recording of the tax deeds for said lot, made to him, by reason of which he had acquired a complete and perfect title under said deeds and was entitled to a decree and judgment of the court for the possession thereof; and in the alternative that if he is found not to be the owner by a good and perfect title to said lot, and entitled to the possession thereof, that then he is yet entitled to a perpetual lien upon the same, for the taxes aforesaid, for each of said years, with interest on each of said sums at the rate of forty per cent per annum, for two years from each of the several dates at which the same were paid, at the rate of twelve per cent per annum to the finding of the court of the amount due, and the allowance of an attorney's fee of ten per cent of the amount, and also to the decree of the court enforcing his lien upon the lot, and an order of sale, in default of payment, to satisfy the same.

The plaintiff's reply to the defendant's answer and cross-bill alleges:

"1. That from August 17, 1866, the date of the sale of the lot to Ahrends, the defendant's grantor, to the commencement of this action, and to the present, the defendant has not, nor has any one through or under whom he claims title to said lot, been in possession of the same or any part thereof, but that the plaintiff and those through and under whom he claims, have been in the continuous and undisturbed possession of the whole of said lot, exclusive of any claim of the defendant therein; therefore it is immaterial whether or not the tax proceedings whereby defendant derives a title were regular and legal, as the title, lien, and claim, of the defendant, are barred by the statute of limitations of this state.

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"2. The plaintiff further alleges in 1875 said lot was delinquent for taxes before assessed; that on September 10, 1875, the lot was duly sold for such delinquent taxes to L. F. D'Gette for the taxes of said year; that on the 12th of September, 1877, E. E. Lyle was the owner of the certificate of such sale, and having presented the same to the county treasurer, received the treasurer's tax deed therefor in due form, conveying the lot to him, who became seised in fee simple of the same and was the owner thereof; that said deed was recorded in the clerk's office of said county on September 17, 1877, in book No. 4 of deeds, p. 461; that on September 24, 1887, said E. E. Lyle, and Hattie A., his wife, conveyed the lot to Martha W. Warren, by deed duly recorded in the clerk's office of said county; that said Martha W. Warren took possession of the lot and occupied the same adversely to any claim of the defendant, until she conveyed the same to the plaintiff; that on February 8, 1888, she sold and conveyed the same to the plaintiff by warranty deed duly recorded in the clerk's office of said county, in book 10, p. 522; that the plaintiff has been hitherto in the peaceable possession and occupancy of said lot, adverse to the claim of the defendant. The plaintiff therefore insists that it is immaterial whether the defendant, or those under whom he claims, obtained a good and perfect title to said lot by reason of said tax proceedings set out in defendant's answer, or otherwise, because all right, title, interest, estate, lien or claim, that might accrue by reason of said proceedings, deeds, and conveyances, are barred by the statute of limitations of this state, and did not accrue within ten years next before the commencement of the action."

The defendant's motion to strike out the second paragraph of plaintiff's reply for the reason that it sets up new matter as an additional cause of action, was overruled by the court.

There was a trial to the court, with findings and decree for the plaintiff, which is now appealed to this court.

The action is predicated upon the statute of limitations, upon which the plaintiff founds his claim of title to the lot in question, or, specifically, upon ten years' adverse possession. It is true that the plaintiff sets out a deed from one Rankin to the undivided half of said lot to Messrs. Warren and D'Gette, with *mesne* conveyances to the plaintiff. But this evidence, I presume, is only intended to fix the extent of plaintiff's adverse possession. Whether the evidence of possession is, or is not, sufficient to establish plaintiff's title, does not seem to be a controlling question in the case, and will not be discussed. The plaintiff's brief is chiefly directed to the points raised by defendant's cross-bill, and it is to that our attention will be directed. The defendant offered in evidence a deed executed by D. F. Jackson, treasurer of Nebraska City, to the defendant, as assignee of Jacob Shoff, reciting that on July 20, 1870, the defendant produced to the treasurer a certificate of purchase dated December 13, 1867, signed by J. Dan Lauer, then collector of taxes of said city, by which it appears that Jacob Shoff, on December 13, 1867, did purchase at private sale in said city, the lot in question, which was sold to him for \$24.30, that being the amount due, returned delinquent for non-payment of taxes, costs and charges for the years 1861, 1862, 1864, 1865, and 1866, (describing the lot,) the same having been offered at public auction, for taxes, and not sold for want of bidders; and there being no personal property found in the city out of which the taxes due on the lot could be made, it was sold at private sale, as the law requires. And it appearing that the defendant is the legal owner of the certificate of purchase, and that the time fixed by law for redeeming the lot therein described has expired and the same is not redeemed, as provided by law, and the defendant having demanded a deed for the lot, the same is set forth, which was duly acknowledged and recorded August 11, 1870.

The defendant also offered a deed from the treasurer of

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Otoe county to John Shoff, for the lot in question, reciting that Shoff on August 16, 1868, produced to the treasurer of said county the treasurer's certificate dated August 17, 1866, from which it appears that John Henry Ahrends, on said last date, purchased at private sale in said county the lot in question, sold to him for \$19.44, the amount due and returned delinquent, for the non-payment of taxes, costs, and charges, for the years, 1860, 1862, 1863, and 1864, and it appearing that Jacob Shoff is the legal owner of said certificate, and that the time fixed by law for redeeming the lot therein described has expired, and the same is not redeemed, as provided by law, and the said Shoff having demanded a deed for the lot, and which was the least quantity that would sell for the amount due thereon for taxes, costs, and charges, and it appearing that the lot was legally liable for taxation, had been assessed and charged on the tax duplicate for 1860, 1862, 1863, and 1864, and had been legally advertised for sale for taxes on August 17, 1866, followed by the granting clause to Jacob Shoff.

The plaintiff offered in evidence the deed, for the lot in question, of Jacob Shoff to Samuel H. Morrison, executed August 14, 1869, and duly recorded on the same date; followed by a deed from Morrison to the plaintiff, for the lot, executed May 10, 1870, and duly recorded on the same date.

The defendant also offered in evidence tax receipts for city and county taxes paid by him upon the lot and upon part of it, for the years 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, and 1874.

It is conceded that the defendant has never been in possession of the lot. The plaintiff resists his claim to a lien for the taxes paid by him and his grantors on the ground that such claim is barred by the statute of limitations; and thereon arises the principal question in this case. The plaintiff in his brief says: "The only question for the court to decide is, Whether the claim of title under a tax deed

will become barred? If so, the judgment herein must be affirmed. No question precisely similar has been brought before the court." And the plaintiff further says: "It is *conceded* that if he had sought the aid of the court to declare the defendant's tax deed void because of irregularities either in the proceedings leading up to the tax sale, or because of defects in the deed itself, that as a condition of relief he would be compelled to pay to the tax purchasers the amount of taxes paid, with interest; * * * but in this case he says that the defendant has slept so long upon whatever rights he may have had that they are barred by the statute of limitations. We admit that the defendant's tax deeds were good, the best ever issued by a treasurer, and that for ten years thereafter he could have enforced his right to the possession; but having delayed beyond the statutory period, twice over, he cannot recover either the possession, or any other benefit from his tax deeds."

The question thus fairly presented was considered by the court, in the consultation room, with great care, and we all came to the conclusion that the plaintiff having sought relief in equity, must, as a condition thereto, discharge the equitable and legal duty of paying the taxes which appear to have been, and are conceded to be, legally assessed upon the property, and paid by the defendant and his grantors.

It may be assumed that the plaintiff, if he is in actual possession of the lot, may remain in possession despite the defendant; or if he is not in possession, he could enter thereon, occupying the same, and the defendant would be unable to oust him; but he is not content with such tenor of possession, in the condition which his acts, and the operation of the law, and the lawful acts of the defendant and his grantors, have left him. He comes into a court of equity asking relief from consequences fairly traceable to his own failure to discharge a common duty which the state requires of all lot owners, as well as the holders of all other species of property.

It is conceded there is considerable force in the plaintiff's claim that the statute of limitations has cleared this lot of all claim for taxes, and, it may be conceded, so far as the *legal* rights of the plaintiff are concerned. But it cannot be admitted that the lapse of time merely, or the undisturbed operation of a statute, can take the place of that measure of justice and equity which is due from every one who invokes the aid of a court of equity in a case where money has been expended to his advantage by his opponent.

As seen in the statement, the plaintiff concedes that had the defendant's title under his tax deed failed by reason of informality or illegality in any of the proceedings which led up from assessment to sale, or in the sale and conveyance, that the defendant would be entitled to a lien on the lot for the money paid for the tax title, and for taxes paid on the lot. But it is claimed that having failed in a matter of time in enforcing the lien, it ceases absolutely, not only in law, but in conscience and equity. We are not able to concur in this view.

On February 13, 1857, the territorial legislature of Nebraska passed an act, approved, adopting the revenue laws and system of the state of Iowa. Section 42 of chapter 37 of the Iowa code then in force, provided that "Taxes upon real property are hereby made a perpetual lien thereupon against all persons except the United States and this state."

On September 21, 1858, the territory of Nebraska adopted a criminal, civil, and general code, part III of which was entitled General Laws, and section 39 of which part contained a provision identical with that of the Iowa code quoted, substituting "territory" for "state," as in the original. This provision was reenacted and constituted section 54 of part I of the General Laws of the territory of 1864, and is retained in section 54, chapter 46, of the revision of 1866, and was reenacted and made section 51 of the revenue laws of this state, approved February 15, 1873, substituting

in the text "state" for "territory." The revenue law now in force contains a similar provision, section 138 of article I, chapter 77, Compiled Statutes, being as follows: "The taxes assessed on real property shall be a lien thereon from and including the first day of April in the year in which they are levied, until the same be paid."

It will thus be seen that whatever may be the remedy for the collection of delinquent taxes, either on the part of the public or of individuals who may have been subrogated to the rights of the public therein, the liability of all private property for taxes, and the tax lien thereon, has been constantly preserved, constantly recognized and reiterated by the legislature on every proper occasion; and this right and lien is recognized as unaffected by the lapse of time, if it is within the sense of language to accomplish it.

Without reviewing the decisions of this court to a great extent, as the time at my command will not admit of it, it will be sufficient to say that the duty of paying the taxes lawfully assessed upon land, which is the subject-matter of the relief sought in this instance, has been uniformly declared to be one that the party seeking relief must discharge as a condition precedent to obtaining it. I refer to the decision in *Dillon v. Merriam*, 22 Neb. 151, cited by counsel for the appellant. In this opinion MAXWELL, Ch. J., held that, "When a party comes into a court of equity asking relief, as a condition, the court will require him to do equity before it will be granted. This principle lies at the foundation of equity jurisprudence. (*Linden v. Hepburn*, 3 Sandf. 671.) This rule is frequently applied where a party brings an action to cancel a usurious mortgage upon land. In every such case where the borrower brings the action, the court will require him to pay the sum actually borrowed, with lawful interest, before relief will be granted. (*Post v. Bank of Utica*, 7 Hill, 391; *Rogers v. Rathbun*, 1 J. Ch. 367; *Tupper v. Powell*, Id. 439; *Fanning v. Dunham*, 5 Id. 142; *Livingston v. Harris*, 3 Paige, 533; S. C. 11

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Wendell, 329; *Vilas v. Jones*, 1 Comst. 278; *Legoux v. Wante*, 3 Har. & John. 184.) This rule will be applied in the cancellation of tax deeds, and where the tax was a proper charge against the land, the land owner, as a condition of cancelling the tax deed, will be required to pay the tax with lawful interest thereon."

I quote from the case at length for the purpose of showing that in this case, as in many others, the obligation of paying taxes, without regard to length of delinquency, has been classed with that of paying interest and of discharging other just and equitable duties as a condition of obtaining relief in a court of equity. Time will not permit the review of the Iowa cases cited by counsel for the appellee. It is probable that it being the policy of that state to sustain tax titles, its courts have not usually gone so far in sustaining the lien as the courts of this state have. But I will call attention to the case of *Tabler v. Callanan*, 49 Iowa, 362, which seems strictly analogous to the case at bar. The court in the opinion say: "The plaintiff holds the patent, the defendant the tax title. The plaintiff asks that his title be quieted against that of the defendant. It is shown that the plaintiff is in possession, holding the land adversely to the defendant's title, which cannot be enforced for the reason that the remedy is barred by the statute of limitations. Plaintiff shows that he is entitled to hold the land. The action is to settle the rights of the parties to the land in controversy. The decree, therefore, correctly declared plaintiff's right to be paramount, and quieted his title against the adverse claim of the defendant.

* * * * *

"The defendant insists that he is entitled to recover the sums paid by him in the purchase at the tax sale, and for subsequent taxes, with penalties and interest, under the doctrine that plaintiff cannot have equity until he does equity. There is force in defendant's claim; but the trouble with it is that it was not made in the pleadings, nor in any

other manner, in the court below. It does not appear that defendant raised any question in the court below involving his rights to recover the money paid by him. While his right to recover in a proper case cannot be doubted, it cannot, in the absence of pleadings presenting it, be first urged in this court. He may enforce this right in another action."

To this citation I will merely add that had the defendant in the cause at bar, not in the pleadings, nor in any other manner, in the court below, set up the fact of his having bought the lot in question at delinquent tax sale and paid taxes thereon, nor prayed the relief of the equitable power of the court to recognize his lien therefor, and grant him relief in equity, it is more than probable that the judgment of the court in this case would have followed that of the supreme court of Iowa, cited.

The counsel for the appellee raises the additional point, "That admitting the defendant's tax deeds were good, the subsequent tax deeds issued thereon, and under which plaintiff claims, vested in the plaintiff the absolute title," etc. It appears from the record that the appellee on the trial in the court below produced in evidence a tax deed to E. E. Lyle upon the lot in question executed by John H. Overton, treasurer of Otoe county, dated September 12, 1877, upon a tax sale made September 10, 1875, by R. H. Miller, then treasurer of said county, to L. F. D'Gette, for the delinquent taxes of 1875. Also a deed from E. E. Lyle to Martha W. Warren, of said lot, dated September 24, 1887. Upon the introduction of these deeds, counsel announced the object to be to show an independent chain of title from the farthest interest in the plaintiff, and as color of title to sustain the adverse possession. If it were the object of the evidence to establish an independent chain of title in the plaintiff and thus tunnel around the defendant's tax title—in other words, to show a title in the plaintiff derived from a tax title from a sale for taxes which became delinquent subsequent to the date of defendant's

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tax deed, thus holding the lot divested of all previous tax liens — then it would be open to objection that by the appellee's own showing, he, or those under whom he claims, was in possession of the lot and claiming to own it at the time of the becoming delinquent of the taxes of 1875, under which that title was derived; and he had already shown a title in the lot, or a part of it, superior to a tax title. Mrs. Warren, under whom plaintiff claims, was possessed of such superior title at the time she received the conveyance from Lyle; so, upon the receipt of such conveyance by her, this deed, instead of building up a new and independent title in her, merged in her better title which she was then possessed of. In other words, she holding what we will assume to be a general title to the lot, or an undivided half of it, the law held it to be her duty to pay the taxes on it, and the law construes that which she did do, into doing that identical thing, to wit, paying the taxes on the lot. As authority on this point, I refer to the case of the *Trustees of the African Methodist Episcopal Church v. Hewitt*, 14 Pacific Rep. 540, cited by appellant: "Where one was in possession and claimed to own real estate under a void tax deed, but later procured a quitclaim deed from the rightful owner of said real estate, the interest he had in the land by virtue of such tax deed was merged in the stronger and superior title he obtained by such quitclaim deed. He then holds such real estate subject to all tax liens that would have been valid if the rightful owner had never parted with his title."

The decree of the district court is therefore reversed, and a decree will be entered in this court in accordance with this opinion, for which purpose a reference is made to H. H. Wheeler, the deputy clerk of this court, to compute and report the amount of taxes, interest, costs, and attorneys' fees, to which the defendant is entitled.

DECREE ACCORDINGLY.

REESE, CH. J., concurs.

MAXWELL, J.

I concur in the holding that he who seeks equity must do equity, and that where a land owner asks to remove a cloud from the title to his land, such as a tax lien or other incumbrance, justice requires that he shall remove such cloud by rendering to the holder thereof what is due thereon. This rule, unless changed by statute, has been constantly applied in cases where it was sought to relieve the complainant from a usurious contract, in which the effect of usury was to forfeit the entire debt and interest. Yet the courts uniformly hold that as a condition of relief the complainant must tender the amount actually loaned, with legal interest thereon. If such tender was made by the complainant, the court would relieve from the excess, but without such offer it would grant no relief, nor would it compel a discovery which would lead to the establishment of usury in the contract—in other words, lead to forfeiture. The leading case in this country appears to be *Rogers v. Rathbun*, 1 Johns. Ch. 367, where it is said: "It is a settled principle that he who seeks equity must do equity, and if the borrower comes into this court for relief against his usurious contract, he must do what is right as between the parties, by bringing into court the money actually advanced, with the legal interest, and then the court will lend him its aid as against the usurious excess. To compel a discovery without such offer would be against the fundamental doctrine of this court, which will not force a discovery that is to lead to a forfeiture. (*Bosanquet v. Dashwood*, Cases Temp. Talbot, 38; *Fritzroy v. Gwillim*, 1 Term. Rep. 153; *Viner*, Tit. Usury, 315; *Chauncey v. Tahourden*, 2 Atk. 393; *Earl of Suffolk v. Green*, 1 Atk. 450.)" See also *Tupper v. Powell*. 1 Johns. Ch. 439; *Morgan v. Schermerhorn*, 1 Paige Ch. 543.

In *Eiseman v. Gallagher*, 24 Neb. 79, this court held that where the borrower goes into a court of equity for

relief from a usurious contract, he must tender the amount of the principal and lawful interest thereon. It is true that in this state the lender may recover the amount actually loaned even where usury is proved, the forfeiture applying only to the interest and costs; but the principle is the same in both cases, and they differ only as to the extent of the forfeiture. If, therefore, a plaintiff who has been in the exclusive uninterrupted possession of land for more than ten years, and has thereby acquired a good title as against all the world, still deems certain taxes and tax deeds a cloud upon his title to said land, and seeks to remove the same, the equity rule applies, and as a matter of justice he will be required to pay what is equitably due thereon. In such case the tax purchaser has paid the taxes due on the land for one or more years, and thereby relieved it from that burden and thus has an equitable claim aside from his tax lien thereon; and although he may have slept upon his rights so long that he cannot enforce them against the land, yet where the land-owner seeks to have evidence of the tax purchase set aside in order that his title upon the records of the county may be clear and freed from suspicion of possible litigation, and thus become more merchantable and of greater value, the court will require him to do justice by paying what is due as a condition of its interposition. (*Dillon v. Merriam*, 22 Neb. 151.) The judgment, therefore, that the plaintiff pay the lawful taxes and interest thereon, together with lawful expenses, is right.

I do not concur in the part of the opinion, however, which holds in effect that the statute of limitations does not apply to tax liens. It is true that the statute declares that taxes shall be a perpetual lien upon real estate. By this, however, it is not declared, nor is it to be inferred, that the lien of the tax purchaser is perpetual, nor even that the remedy in favor of the state to enforce the lien may not be lost.

Section 179 of the act "to provide a system of revenue,"

approved March 31, 1879, (sec. 179, art. 1, chap. 77, Compiled Statutes,) provides: "The owner of any certificate or certificates of tax sale upon any tract of land or town lot shall be deemed to be the assignee and owner of all the liens for taxes of the state, county, city, village, township, district, and other municipal subdivisions, for which such tract or lot was sold, and may, instead of demanding a deed therefor, as provided in this act, proceed by action at any time before the expiration of five years from the date of such certificate, to foreclose the same, and cause the tract or lot to be sold for the satisfaction thereof, and of all prior and subsequent taxes paid thereon, in all respects, as far as practicable, in the same manner and with like effect as though the same were a mortgage executed to the owner of such certificate or certificates for the amount named therein, together with such subsequent and prior taxes paid thereon by the person having or owning the title to said land or lot adverse thereto. More than one certificate on the same property may be included in the same action, but each, together with prior and subsequent taxes paid thereon, shall be deemed and stated as a separate cause of action: *Provided*, That no action to foreclose any such lien shall be maintained unless the owner of any such certificate shall have served notice on the owner or occupant of the land mentioned therein, within the time and in the same manner as provided in section 123."

Section 180 provides: "If the owner of any such certificate shall fail or neglect either to demand a deed thereon, or to commence an action for the foreclosure of the same, as provided in the preceding sections, within five years from the date thereof, the same shall cease to be valid or of any force whatever, either as against the person holding or owning the title adverse thereto, and all other persons, and as against the state, county, and all other municipal subdivisions thereof."

The question here presented was before the court in

Helphrey v. Redick, 21 Neb. 83, and it was held that on the facts stated in that case the action was not barred. It is evident, however, that if the action in that case had not been brought within five years after the cause had accrued, it would have been declared barred by the statute of limitations. It will be observed that under the statute of 1879 it is unnecessary to obtain a tax deed, but the action may be brought directly on the certificate of purchase, and a decree of foreclosure be rendered thereon; but the action must be brought before the expiration of five years from the date of the certificate. Under the previous holdings of this court, the action must be brought within five years from the time the title failed; in other words, from the time the deed had been declared invalid by a competent tribunal. The change, therefore, is significant, and was, no doubt, intended to fix a definite time within which an action to foreclose the lien should be brought.

Section 3, article 9, of the Constitution, provides that the right of redemption from sales of real estate for taxes and special assessments "shall exist in favor of owners and persons interested in such real estate for a period of not less than two years from such sales thereof;" and that "occupants shall in all cases be served with personal notice before the time of redemption expires." The deed therefore must be taken out, if at all, when the time to redeem expires. If the land is not redeemed, the purchaser may proceed to enforce his lien; but the action must be brought within five years from the date of the certificate whether he demand a deed or not. Section 180 declares that if the action is not brought in five years "the same [the right to bring the action] shall cease to be valid or of any force whatever." The right to foreclose a tax lien is given alone by statute and is governed solely by it. The statute therefore limits the time within which the action may be brought to five years, and this court has no power to extend the right beyond that period. It is a well-known fact that many per-

sons who pay their taxes when they become due, fail to preserve the evidence of such payment, and after the lapse of a few years, if the means of enforcing a lien is maintained by the courts without limit as to time, would in some cases at least, be liable to pay their taxes a second time, and with the addition of costs and interest. The legislature evidently intended to guard against this, hence fixed upon five years as the limit in which to bring the action. A party holding an obligation in writing for the unconditional payment of money is barred unless an action is brought on the same within five years from the time it becomes due or a payment is made thereon, and it is but reasonable that the same rule be applied to the enforcement of a tax lien upon real estate. The courts, under the peculiar wording of a former statute, were compelled to hold that the action could be brought in five years from the time the title *failed*; hence, upon declaring a tax-deed invalid, taxes for ten, twenty, or even thirty years, could be recovered; but that remedy is now taken away, and the act of 1879 has taken its place.

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THE STATE OF NEBRASKA, EX REL. ISAAC N. GODARD,
·V. NELSON TAYLOR, RESPONDENT.

[FILED MAY 31, 1889.]

1. **Township Organization: SUPERVISORS.** Under our township system of government, a supervisor is a township officer. To constitute a member of the county board of supervisors, is a duty and franchise growing out of, and incident to, his office of township supervisor.
2. ———: ———: **RESIGNATION.** When such officer resigns, his resignation should be addressed to the township clerk of the proper township.
3. ———: ———: **VACANCY.** The vacancy caused by such resignation may be filled by appointment: First, by the town board;

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second, where the offices of the town board are all vacant, by the township clerk; third, where there be no township clerk, by the county clerk.

4. ———: ———: ———: ELECTION. When such vacancy has not been filled by appointment, as above, the same may be filled by election at a special town meeting when properly convened.

INFORMATION in the nature of a quo warranto.

William Leese, Attorney General, and R. S. Norval, for relator.

Smith & Biggs, for respondent.

COBB, J.

Information was filed in this court by the attorney general in behalf of the state as well as that of the relator, Isaac N. Godard, by which the court is informed and given to understand, that on the 6th day of November, 1888, the relator was a citizen of the United States, and a resident of "J" township, in Seward county, and then had and now has all the qualifications required by law to hold the office of supervisor of "J" township aforesaid; that at the general election held on the day aforesaid for county and township officers, one William Ahlschwede was duly elected to the office of supervisor in Seward county for the township of "J;" that he thereupon duly qualified and entered upon the duties of his office and thereby became one of the members of the county board of Seward county and continued in said office until January 5, 1889, when he sent in to the county clerk of said county his resignation in writing; that said resignation was, on the 28th day of January, 1889, received and accepted by said county clerk; that on the said 28th day of January, 1889, the said county clerk notified the county treasurer and county judge of said county, in writing, of the vacancy in the office of supervisor, and in the membership of the county board, and

requested said treasurer and county judge to meet him at his office forthwith for the purpose of making an appointment of some one to fill said vacancy ; that thereupon said county clerk, county treasurer, and county judge, did, on the date last aforesaid, appoint the relator, Isaac N. Godard, as a member of the county board, and supervisor of "J" township, to fill the vacancy caused by the resignation of William Ahlschwede as aforesaid ; that on said last-mentioned date the relator was duly notified by the said county clerk of his said appointment ; that on the same day he filed his bond with sureties, which was duly approved, and took and subscribed the oath of office in due form of law, and duly accepted said office ; that the county of Seward has been and now is duly organized, and acting under the law and system of township government ; that notwithstanding the appointment of the relator to said office, the defendant, Nelson Taylor, a resident of "J" township, on the first day of February, 1887, and from thence continuously hitherto, without any legal warrant, claim, or right, has used and exercised, and continues to use and exercise, and still does unlawfully use and exercise, the office of supervisor of Seward county for "J" township for the unexpired term of William Ahlschwede as aforesaid, in place of the relator, Isaac N. Godard, and claims to be a supervisor and member of the county board of Seward county, and to have, use, and enjoy, all the rights, privileges, and franchises, of said office, to the damage and prejudice of the right of said county and township, and said relator, and against the peace and dignity of the state ; with prayer for judgment.

The respondent, Nelson Taylor, filed his answer to the said information, in which he admitted that at the general election held on the sixth day of November, 1888, one William Ahlschwede was duly elected supervisor in and for "J" township in Seward county, and that he thereupon duly qualified for and entered upon the duties of said of-

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fice. He also admitted that the county of Seward now is, and for three years past has been, acting under the law of township organization, and is controlled by supervisors elected by the townships thereof. He also admitted and alleged that he is a resident of "J" township in said county, and that since the 19th day of February, 1889, he has been and now is using and exercising the office of supervisor of said township, and claims to be a member of the county board; but he denies that he holds said office unlawfully or without legal warrant; and he denies that the relator, Isaac N. Godard, is entitled to said office, or to assume the execution of the duties thereof; with a general denial.

Respondent also alleges that the said William Ahlschwede did on the 18th day of January, 1889, resign his said office of supervisor of township "J" in said Seward county to the town clerk of said township, said resignation being on said day duly accepted by said clerk; that on the said 18th day of January, 1889, a petition in due form signed by a majority of the town board of said township, together with at least twelve freeholders of said township, was filed in the office of said town clerk, asking that said town clerk call a special meeting of the electors of said township, as provided by section 19 of chapter 18 of the Compiled Statutes, and stating in said petition that the object of said meeting was to fill the vacancy caused by the resignation of said William Ahlschwede as aforesaid; that on the 21st day of January, 1889, notices as required by law calling for a special town meeting to be held on the 31st day of January, 1889, at the place where the last annual election was held in said township, were posted in five of the most public places in said township, said notices containing a statement of the object of said meeting; that in pursuance to the call in said notices, on January 31, 1889, the electors of said township met at the place of holding the last annual election, and proceeded to choose a

supervisor to fill the unexpired term in the place of William Ahlschwede, resigned; that the total number of legal voters in said township is, and was at that time, not to exceed 200, and at said special town meeting seventy-seven legal voters of said township were present and voted for supervisor, of which the relator, Isaac N. Godard, received two votes, and the respondent received seventy-five votes; that at all times mentioned in said answer respondent has been a citizen of the state of Nebraska and a resident of "J" township in Seward county, and possessed of all the qualifications requisite for the office of supervisor of said township; that afterwards, on the 4th day of February, 1889, Jacob Teuscher, the town clerk of said township, issued and delivered to respondent a certificate of election to the office of supervisor, as provided by law; that on the 7th day of February, 1889, respondent filed with the county judge of said county his bond in due form as supervisor of said township in the sum of \$1,000, with good and sufficient sureties; that on the 19th day of February, 1889, he presented to the board of supervisors then in session his certificate of election aforesaid, and by order of said board his certificate was declared in due form, and he thereupon assumed and entered upon the duties of supervisor of "J" township in Seward county, and *ex officio* a member of the board of supervisors of said county; and that since that time he has continued to hold, exercise, and enjoy, the rights, privileges, and franchises, of said office; and that respondent claims and occupies said office by virtue of the election at said special town meeting as herein set forth, etc.; with prayer for judgment.

Thereupon the relator filed a general demurrer to the answer of the respondent.

A stipulation signed by the respective counsel of the parties, in which each and every of the material facts contained in the relation and answer respectively are admitted to be true, was filed with the papers.

There are two questions presented:

"1. To whom should the resignation of a township supervisor be presented: to the township clerk or to the county clerk?

"2. In what manner should the vacancy caused by such resignation be filled: by an election at a special town meeting held for that purpose, or by appointment by a board composed of the county clerk, county judge, and county treasurer?"

Section 102 of chapter 26, Compiled Statutes, provides that: "Resignations of civil officers may be made as follows: * * * 4. By all county and precinct officers to the county board, and by members of the county board to county clerk. 5. By all township officers to the township clerk, and by the township clerk to the town board." This chapter was passed by the legislature of 1879. The act to provide for township organization, approved February 16, 1877, had been declared unconstitutional by the supreme court. (*State, ex rel. Jones, v. Lancaster County*, 6 Neb. 474.) The subsequent act on that subject was not passed until February 24, 1883, so that at the date of the act now under consideration there was but one kind or organization of county board known to the laws of this state. That was composed of county commissioners, who were elected by the voters of the entire county and were unquestionably county officers. This county board composed of county commissioners existing in every organized county in the state, constituted a sufficient subject for the application and operation of the language used by the legislature, when it spoke of "the county board" or of "members of the county board;" and I do not think the argument admissible that this language also applies to another kind of county board composed of members elected by the several townships of the county whose office was created by a law enacted four years later.

It is equally true that when the law-makers used the lan-

guage, "township officers," "township clerk," and "town board," they spoke of officers and a board then unknown to the laws of the state; and whatever might be said of the application of these provisions to such officers and boards as have been provided for by laws subsequently passed, such application can only be shown by direct language, and not by implication. A rule of construction often invoked here and elsewhere requires us to give some meaning, if possible, to every section, clause, sentence, and word, of a statute. This we can do as to the fourth clause of the section without difficulty; not only can we give it some meaning, but its full, obvious, and natural meaning, without resorting to inference or invoking the provisions of a statute which had been judicially declared no statute, or of one which has long since been brought into existence. But not so as to the fifth clause of the section: unless we construe it to apply to the "township officers," "township clerk," and "town board," provided for by the act of February 24, 1883, we can give it no application or meaning whatever.

An examination of the provisions of the act of February 24, 1883, *supra*, can leave no doubt that the supervisor therein provided for is a township officer in the fullest sense of that language. But I fail to find anything in said statute to justify the view that he is also a county officer; nor is he so designated or classified in any statute to which my attention has been directed. Section 61 of the act above cited, provides that "The board of supervisors shall meet at such times as may be provided by law, and each member thereof shall be allowed, when actually employed, the sum of two dollars per day, and mileage at the rate of five cents per mile for each mile necessarily traveled, and no more, as compensation for his services and expenses in attending the meetings of the board or any other business for the benefit of the county," etc.

In the case of *Bruner v. Madison County*, 111 Ill. 11,

cited by counsel for the relator, a provision of the statute of Illinois similar and probably identical to the above was construed. The court in the opinion say: "The supervisor, though elected as a town officer, is also a county officer, as a member of the county board." The question before that court was, whether a supervisor of the town of Alton, in Madison county, whose duty it was to take care of the paupers of said town, under a system which made no distinction between town and county paupers, was entitled to compensation for such services from the county. The circuit court had held that he was, and gave judgment accordingly. The appellate court reversed the judgment and the supreme court affirmed the judgment of the appellate court, thus denying the proposition that this officer, while lawfully engaged in disbursing the county money in the relief of the county poor, was entitled to pay from the county. Indeed, the court comes to the conclusion that he is not entitled to compensation for such services from any source. The question whether the supervisor plaintiff was a county officer in any sense, was not involved in the case, nor logically involved in the argument either as a major or as a minor proposition, and hence that part of the opinion above quoted is but *obiter dicta*.

While the question under consideration is not entirely free from doubt, I am of the opinion that the resignation of Ahlschwede as supervisor of "J" township was properly addressed to the clerk of said township.

2. Section 103 of the act provides that "Vacancies shall be filled in the following manner: * * * In township offices by the town board; but where the offices of the town board are all vacant, the clerk shall appoint, and if there be no town clerk, the county clerk shall appoint."

Having reached the conclusion that the supervisor, in respect to his election or appointment, is a township officer, and that his resignation should be addressed to the township clerk, by applying the language of the 103d section,

above quoted, it follows that the vacancy caused by such resignation may be filled: 1. By the township board. 2. Where the offices of the town board are all vacant, by the township clerk. 3. Where the offices of the town board are all vacant, and there be no town clerk, by the county clerk. There is no provision for the filling of a vacancy in any township office by a board consisting of the county clerk, county judge, and county treasurer.

But the above is not the only manner provided by law for filling vacancies in township offices. Section 19, art. 4, of the act approved February 24, 1883, now constituting chapter 18 of the Compiled Statutes, provides for the calling and holding of special town meetings under the circumstances and upon the conditions therein set out, and sec. 20 provides as follows: "The electors at special town meetings, when properly convened, shall have power to fill vacancies in any of the town offices when the same shall not already have been filled by appointment," etc. I agree with counsel for relator in the brief that if the vacancy in the case at bar had already been filled by appointment, at the time of the holding of the special town meeting at which respondent claims to have been elected, then such election would be invalid under the provisions last above quoted. But it need scarcely be said that a simulated appointment without lawful authority to make it, will not fill a vacancy. Indeed, I do not understand counsel to claim that the office of supervisor of "J" township was directly filled by appointment, but only as a result of the alleged filling of the vacancy in the county board. This theory is obviously faulty. The vacancy in the county board was not created directly, but resulted from the vacancy in the office of township supervisor made by the resignation of Ahlschwede, and could only be filled as the result of filling that vacancy in the manner provided by law. In my view of the case, the vacancy in the office of township supervisor caused by the resignation of Ahlschwede not having been filled by

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appointment by competent authority—that is by the town board; or, the offices of the town board being all vacant, by the township clerk; or there being no town clerk, by the county clerk—the vacancy still existed at the time of the holding of the special town meeting, and was lawfully filled by the election of the respondent.

The demurrer is therefore overruled and the writ denied.

WRIT DENIED.

THE other Judges concur.

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CHARLES M. PLANCK, PLAINTIFF IN ERROR, V. NETTIE BISHOP, DEFENDANT IN ERROR.

[FILED MAY 31, 1889.]

1. **Bastardy: PLEA: TRIAL.** One P, being charged under the bastardy act with being the father of a bastard child, was recognized to appear before the district court to answer to the charge. He thereupon appeared in that court and entered a plea of "not guilty," and a trial was had which resulted in a verdict of guilty. This verdict was afterwards set aside and a second trial had, which resulted in a verdict of guilty. *Held*, That the plea of "not guilty" having been entered on the first trial, it was unnecessary to again enter the plea on the second trial. *Quære*: Whether the failure to enter the plea before trial would affect the verdict.
2. —: **EVIDENCE.** On a trial under the bastardy act the complaining witness testified that the defendant had sexual intercourse with her on a day named. The defendant, thereupon, while testifying in his own behalf, denied that he had intercourse with her on that day. *Held*: 1. That any question relating to the situation of the plaintiff and defendant while together on that day, or about that time, was proper on cross-examination. 2. That the denial of sexual intercourse on the day named was not a denial that such intercourse had taken place.

2. Errors which occur on the trial must be assigned in the motion for a new trial, or they will not be considered.
4. Verdict. *Held*, That the verdict was sustained by the evidence.

ERROR to the district court for Holt county. Tried below before KINKAID, J.

H. M. Uttley, for plaintiff in error, cited: *Hutchinson v. State*, 19 Neb. 267; *Grigg v. People*, 31 Mich. 471; *Aylesworth v. State*, 65 Ill. 301; *Graeter v. State*, 54 Ind. 159; 1 Greenleaf on Evidence 13th Ed. sec. 445; *Davis v. Neligh*, 7 Neb. 84; *Boggs v. Thompson*, 13 Id. 403; *Cool v. Roche, Hall & Ray*, 15 Id. 24; *McFarland v. People*, 72 Ill. 368; *McCoy v. People*, 65 Id. 439; *McClellan v. State*, 28 N.W. Rep. 347; *State of Iowa v. Smith*, 16 Id. 585.

B. F. Roberts, *E. M. Lowe*, and *A. E. Rice*, for defendants in error.

MAXWELL, J.

On May 21, 1887, the defendant in error filed a complaint on oath before the county judge of Holt county wherein she swears that she is an unmarried woman residing in Holt county, and that on the 26th of April, 1887, she was delivered of a bastard child, and that Charles M. Planck is the father of said child. An examination was thereupon had before said county judge, and Planck was required to enter into a recognizance for his appearance at the next term of the district court of Holt county. At the next term of the district court, a trial was had, and Planck was found guilty. This verdict, however, was set aside, and a new trial granted. Afterwards, at the December, 1887, term of court, a trial was again had in the district court of Holt county which resulted in a verdict finding the plaintiff in error guilty, and a motion for a new trial

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having been overruled, judgment was rendered against the plaintiff in error for the sum of seven hundred and fifty dollars, payable in installments, for the maintenance of said child. The first objection of the plaintiff in error is that there was no plea of "not guilty" entered before he was put upon trial. This objection, however, is not true in fact, as the record shows that on the first trial, had on the 24th day of August, 1887, the defendant entered a plea of "not guilty." The plea being once entered, it was unnecessary to repeat it at the next trial, and there was no error in not requiring the plaintiff in error to repeat the plea. It is doubtful if the failure to plead not guilty before trial would affect a verdict of guilty found after trial of the case. (*State v. Cassady*, 12 Kas. 551; Maxw. Crim. Proc. 541.) But that question is not before the court. The first objection, therefore, is overruled.

The second ground of objection is that the court erred in permitting the cross-examination of the plaintiff in error to take so wide a scope. The defendant in error, on cross-examination, had testified that the plaintiff in error had intercourse with her on the 1st day of August, 1887, and in substance that the plaintiff in error had called on her at her father's residence, just before sunset of that day, and invited her to take a ride with him in his buggy; that she consented provided he would not go very far; that he drove to one Shaw's, about five miles distant, and after staying there some time, started back towards her father's house; and that the plaintiff in error on the way back stopped his team, and had sexual connection with her in the buggy against her will; and that the child in question was begotten at that time.

To contradict this testimony, the attorney of the plaintiff in error asked him this question:

Q. I will ask you to state to the jury if on the 1st of August, 1886, in a buggy, somewhere north of plaintiff's place of residence, you had connection with her or not?

A. No sir; I did not, nor at any other place on that day.

The attorney of the plaintiff in error thereupon sought to limit the cross-examination to the single question whether or not the plaintiff in error had had connection with the defendant in error on that day, and to exclude all inquiry about the ride in the buggy. In our view, any question was proper on cross-examination in relation to the conduct of the plaintiff in error with the defendant while they were together on that day, or about that time, which would tend to show his guilt of the offense charged, or to exonerate him from the same. The fact that he limited his denial to that particular day, and not generally, is a circumstance which both a jury and court may well consider.

The essential question was, "Was he the father of the child?" If not, why not deny the charge in an open, general manner? The complaining witness might be mistaken as to the particular day on which the intercourse took place, but not as to the fact. Where a charge is general, therefore, that the party accused had sexual intercourse with the complaining witness at a particular date, and that he is the father of her bastard child, and this charge is supported by the testimony of such witness, the denial of the accused must be as broad as the charge, to be effective. It is the duty of the court and jury to ascertain the facts in the case, and that can only be done by a full inquiry into all the circumstances of the case. If, therefore, the accused offers himself as a witness and rests his defense upon a partial denial of the testimony of the complaining witness, he need not be surprised if the court and jury deem that portion not denied as thereby admitted to be true. In other words, the question presented was, Did the accused at or about the time charged, have intercourse with the complaining witness? His testimony is that he did not have such intercourse on a particular day. That is not a sufficient denial. Besides, as the plaintiff in error seems to rely

altogether on technicalities, it is probable that he did not consider the night of August 1, 1885, when the proof shows the act was done, as part of that day. It is but justice that the putative father provide a suitable maintenance for his own child. The charge, however, is a serious one, affecting not only the finances of the accused, but also his good name. The facts and circumstances, therefore, should be carefully weighed, and the proof be of such a character as to show the guilt of the accused. The proof in that regard in the case at bar is sufficient.

The third objection is that the instructions, taken together, "encourage the jury in arriving at the conclusion that the defendant is guilty."

No particular error in the instructions has been pointed out as prejudicial, and as we do not know what paragraph is complained of, they will not be reviewed. In a number of cases it has been held that objections to instructions must be made in the motion for a new trial. (*Schreckengast v. Ealy*, 16 Neb. 510; *H. & G. I. R. R. Co. v. Ingalls*, 15 Id. 123; *Cleveland Paper Co. v. Banks*, Id. 23; *Weir v. B. & M. R. R. Co.* 19 Id. 213; *Nyce v. Shaffer*, 20 Id. 509.)

There is no objection of this kind in the motion for a new trial.

The fourth and fifth objections relate to the weight of evidence, and may be considered together. In our view there is no force in these objections, as the evidence is sufficient to show that the plaintiff in error is the putative father of the child in question. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

**MORSE & BRUNNER, PLAINTIFFS IN ERROR, V. ANDREW
TRAYNOR, DEFENDANT IN ERROR.**

[FILED MAY 31, 1889.]

1. **ACTION: REAL PARTY IN INTEREST: TRIAL: QUESTION FOR JURY.** One T. being the owner of certain real estate, desired to sell the same, and employed M. & B., real estate agents, to effect a sale at a specified price. The price was advanced from time to time until about June 1, 1887, when M. & B. employed one S. to find a purchaser on the terms specified, which, in two or three days afterwards, he did. S. thereupon brought an action against T. for his commission, and was defeated. M. & B. thereafter brought an action against T. to recover commission for the sale, when the judgment against S. was pleaded in bar. *Held:* First, that the judgment against S. would not bar a recovery by M. & B. Second, that the remedy of S. to recover compensation was against M. & B. Third, that questions of fact must be submitted to the jury, and an instruction in effect withdrawing such questions from the jury, was erroneous.
2. ———: **BAR.** A finding and judgment against one who from want of interest cannot maintain the action, will not bar the real party in interest from bringing and maintaining the suit.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

Warren Switzler, for plaintiff in error, cited: *Herman on Estoppel*, sec. 102; *Hardy v. Mills*, 35 Wis. 149; *Towns v. Nims*, 5 N. H. 259, *Hill v. Morse*, 61 Me. 541; *Strother's Adm'r v. Butler*, 17 Ala. 735; *Schribar v. Platt*, 19 Neb. 630.

Hall & McCulloch, for defendant in error, cited: *Landis v. Hamilton*, 77 Mo. 554; *Stoddard v. Thompson*, 31 Iowa, 80; *Cole v. Favorite*, 69 Ill. 457; *Herman on Estoppel*, sec. 150; *Emery v. Fowler*, 39 Me. 326; *Warfield v. Davis*, 14 B. Monroe, (Ky.) 40.

MAXWELL, J.

The plaintiffs brought an action against the defendant to recover certain commissions for the sale of real estate belonging to the defendant, and on the trial a verdict and judgment were rendered for the defendant.

The cause of action is stated in the petition as follows: "That heretofore, to wit, prior to the 4th day of June last, the said defendant employed said plaintiffs, as real estate agents in said city, to procure for him a purchaser of lot one in block two hundred and four and one-half, in the city of Omaha, aforesaid; that in the pursuance of said request, these plaintiffs did produce and furnish said defendant a purchaser for said premises, and did negotiate a sale thereof for the price for which the same had been left with them for sale, to-wit, the price of twelve thousand five hundred dollars, and for which the defendant agreed to pay the plaintiffs the usual and customary commission charged by real estate men in said city at said time for said sale, amounting to three hundred and thirty-seven dollars and fifty cents, which amount, the plaintiffs allege the fact to be, is now due and payable to the plaintiffs from the defendant for said services, with interest from the 4th day of June, 1887, on which day the sale of said premises took place, by and through the agency of said plaintiffs, and to the purchaser who was by them produced for said defendant."

To this petition, the defendant, in his amended answer, alleges that "On the — day of —, 1887, an action was brought in the county court of said county for the identical cause of action sued on herein by one George Seah against this defendant; that said action was for the use and benefit of said plaintiffs, Morse & Brunner, and they were the real though not the nominal parties plaintiff; that on the — day of November, said action was tried in said court, and judgment was rendered in favor of this defend-

ant; that no appeal was taken from said judgment so rendered in the county court, and said plaintiffs are bound by the same and estopped to bring this action against defendant for the same cause of action in this court."

The testimony tends to show that in the latter part of the year 1886, the defendant placed the property in question in the hands of the plaintiffs for sale at \$10,000. Afterwards, in January, 1887, he raised the price to \$12,000 and so notified the plaintiffs. Soon afterwards he again raised the price to \$12,000 net to him. He claims to have discharged the plaintiffs sometime in May, 1887; but this is denied by them. About the 1st of June, 1887, the plaintiffs informed one George Seah, who was also a real estate agent, of the terms and conditions of sale of the property in dispute and agreed with him that if he could find a purchaser for the property upon the terms stated, they would divide the commission with him. Seah thereupon in a few days, found a purchaser for the property. There is no dispute about this, the only controversy on that point being whether the price agreed to be paid was the gross sum or net to the defendant.

Mr. Seah testifies on that point:

Q. You say you took them to see the property. Is that your answer?

A. Yes, sir.

Q. Was any one present when you took them there.

A. When I took ——?

Q. When you took them to see the property—do I understand you to say that you took them to the property to show it to them?

A. Yes, sir.

Q. Was there any one present at the property when you went there to show it to them—did you see any one on the property?

A. Not when I was showing it to them. At first I did not see any one.

Q. Well, after you showed it to them first, did you leave there, or did you not?

A. No; I showed them the outside of the property, and they desired to see the inside of the house.

Q. State what you did with them — what was the object in taking them there.

A. The object was to sell them the property. I left them on the outside, and I went to the back part of the house to see Mr. Traynor.

Q. Did you see him?

A. Mr. Traynor came out, and I introduced myself, and my business, and asked him if the property was for sale, and he said it was.

Q. Did you or did you not say anything to him at that time with respect to what your business was?

A. Yes; I introduced myself and my business.

Q. What did you say your business was?

A. Real estate.

Q. Well, go ahead.

A. I asked him if the property was for sale, and he said it was. I asked him the price, and he said it was \$14,000. I told him Mr. Brunner had placed it with me to sell for \$12,000 net, and to ask \$12,500. He says, "Well, that is all right." He says, "I want \$14,000 after the 1st of August, but if you sell it immediately, why, I will let it go."

Q. Then what was done further by you?

A. I told him I had some parties out on the sidewalk and had priced it to them for \$12,500, and he sent me to bring them in. I went out and brought Mr. and Mrs. Stewart in the yard and introduced them in the yard to Mr. Traynor. He showed them through the house, and they bought the property right there.

The defendant testifies on that point as follows:

Q. When Mr. Seah came up there to see you did he state to you that he represented Morse & Brunner?

A. No, sir, he did not.

Q. Did he at that time make any claim to you that he represented Morse & Brunner at all?

A. No, sir, he did not. I will state the conversation we had.

Q. You may state the conversation you had.

A. When Mr. Seah came there I was standing at the back door, and he wanted to know if my name was Traynor; I told him it was.

Q. Was that the first time you ever saw Mr. Seah?

A. Yes; the first time I ever saw Mr. Seah to know him. He wanted to know if that property was for sale. I told him it was. He says, "What are the figures?" I says, "\$14,000." He says, "I understand that Morse & Brunner had it for \$12,500." He did not represent that he was an agent for Morse & Brunner, and he did not show me any card, or introduce himself in any shape or form. I says, "If I can get \$12,500 for it now I will take it, but after the first of August I want \$14,000. I will build here." I calculated to build some buildings.

Q. Did he at that time claim any commission from you, or ask for any commission from you?

A. No, sir; there was nothing said about any commission, or anything else. Then he says, "I do not want the property myself; I have a friend around to the front." He says, "Come around and I will introduce them." I says, "There is no use of introducing me to anybody for any less figures than that," and he took me around and introduced me to Mr. and Mrs. Stewart.

Q. When was the first time you ever learned Mr. Seah claimed a commission?

A. The first time that Seah claimed a commission was in the Omaha Savings bank, on the 30th of June, when the original papers were turned over.

Q. State to the jury what conversation you had at that time in regard to commissions.

A. When the final settlement came up, it appears that

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Mr. Seah—and Mr. Stewart had paid Mr. Seay \$40; that is the way it was—to bind the bargain. I did not get the \$40. I did not know anything about the \$40 being paid. When Stewart came to pay me he wanted to deduct the \$40 that he had paid to Seah. I made the bargain with him. I says, "You are the man I made the bargain with," and Mr. Stewart says, "It is for you and Seah." I says, "That is all right, the contract is \$12,500," which Mr. Stewart paid me, and Mr. Seah demanded his commission. I told him I did not owe him any commission; "but," I says, "if you want to take \$40 for your trouble, I will make you a present of the \$40;" not that I thought he was entitled to it.

The testimony shows that Seah brought an action against the defendant and failed to recover. The exact ground upon which he was defeated does not appear, but apparently because there was no privity of contract between them. The court instructed the jury that:

"It appears in evidence and is undisputed that the property for the sale of which the plaintiffs seek to recover in this action, was placed in the hands of the plaintiffs, to sell, by the defendant, at a stipulated price. It also appears that the plaintiffs entered into an arrangement, or agreement, with one Seah; that if said Seah should procure a purchaser for said property, that they, the plaintiffs, would divide commission with him. In pursuance of said agreement, it also appears that said Seah did find a purchaser and effect a sale and that the said Seah afterwards sued the defendant in the county court for commission on account thereof, said commission to be divided with plaintiffs, if recovered. In view of all the testimony in this case, the court instructs you, that said suit was an adjudication of the matters in issue here, and you are therefore directed to bring in a verdict for defendant.

In giving this we think the court erred.

Brunner testifies that the defendant employed him to sell

the property in controversy and that he had employed Seah to find a purchaser, and that the agency of the plaintiffs for the defendant to sell said property was in full force when the sale was effected. Other witnesses testified to substantially the same facts. Seah testifies that he was employed by the plaintiffs to effect a sale upon certain terms and conditions, and that he so informed the defendant. If this testimony is true, the plaintiffs will be entitled to recover their commission and will be liable to Seah for one-half thereof. Seah must look to the plaintiffs for his compensation and not to the defendant. And this disposes of the objection that the judgment against Seah was a bar to this action. The question here presented was before the court in *Gayer v. Parker*, 24 Neb. 643, and it was held that if different proof is required to sustain the action, a judgment in one of two cases is no bar to the other.

At common law, a mistake in bringing the action—as in assumpsit when it should have been trespass on the case—was no bar. In such action as it would be impossible to prove a promise, express or implied, the action of assumpsit would fail, but this would not preclude a recovery upon the proper statement of facts and proof. So if a cause of action is brought against a defendant by one who is not entitled to a recovery and is defeated, this will not prevent another who has a good cause of action against the defendant upon the same matter, from maintaining an action. Suppose the holder of a promissory note should bring an action thereon, and on the trial the court should find from the proof that he was not the real party in interest—the person entitled to the avails of the judgment—and therefore should find against him and dismiss the action: would such dismissal defeat the real party in interest from bringing an action thereon? That it would not will be conceded, because the case was not decided on the merits—that there was no cause of action against the defendant on the matter in dispute—but simply that no such cause existed on such mat-

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ter in favor of the plaintiff. The requirement of the Code is that an action shall be brought in the name of the real party in interest—except in certain cases mentioned, of which this is not one. The defendant's attorneys recognize this requirement of the Code and say that the action was brought for the plaintiff's benefit, and therefore they are bound by the judgment. Even if such were the case it will not bar this action.

The plaintiffs were not parties to the record, and the defendant evidently objected that he had made no contract with Seah; that he was a mere volunteer, and therefore the defendant was not indebted to him. The question whether or not the defendant employed the plaintiffs to sell his property, and that in pursuance of such employment they, through Seah, did sell the same, has not yet been tried. Experience has shown that mistakes from various causes are liable to occur in bringing actions—such as ignorance of facts, failure of proof on a material point, exclusion of evidence, etc. The law recognizes this, and hence permits the amendment of a petition in any form, so that the identity of the cause of action is preserved, and of the answer to set up any defense which the defendant may have. The law endeavors as far as possible to protect and enforce the rights of parties; and while a judgment upon the merits will conclude all who were properly before the court in that action, a judgment against one who could not maintain the action for want of interest therein, will not bar the real party in interest. No question of privity arises in this case, a privity being one who claims under a party as to interest, estate, or kindred. (*Bush v. Knox*, 2 Hun, 578; *Wells, Res Adjudicata*, 23.)

The plaintiffs, through Seah, effected a sale of the defendant's property for \$12,500. The plaintiffs say that they were authorized to sell at \$12,000 net, and that the \$500 in addition was for their commission, and Seah testifies that he so informed the defendant before the sale of

the property. If this testimony is believed by the jury, it will be their duty to return a verdict for the plaintiffs. In any event the questions are questions of fact to be submitted to the jury, under proper instructions from the court.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other Judges concur.

26	602
36	861
26	602
40	597

ROBERT VOLKER, PLAINTIFF IN ERROR, V. THE FIRST
NATIONAL BANK, DEFENDANT IN ERROR.

[FILED MAY 31, 1889.]

1. **Usury: EVIDENCE.** In an action against a national bank to recover the penalty provided by the United States statute for taking usurious interest, the testimony of the plaintiff, the principal witness relied upon to establish the usury, was vague, indefinite, and unsatisfactory. *Held*, That the court could not review the findings of fact of the jury.
2. **Evidence: ACCOUNT BOOKS.** Under section 346 of the Code, books of account which in other respects are unobjectionable, may be introduced in evidence without calling the party or clerk who made the entries to prove the same, where a sufficient reason is given for not calling such witness.
3. ———: ———. When books are identified as the books of original entries of the party, and the items and entries therein of the adverse party's account are given in evidence without objection, it is too late to object that the person who made the entries was not called to prove the same.
4. **Judgment in Excess of Verdict.** In an action to recover a penalty the jury returned a verdict for \$16.60 in favor of the plaintiff. He thereupon filed a motion for a new trial, and assigned among other grounds that there was error in the amount of the assessment, as \$21.50 usurious interest had been admitted. The court

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thereupon with consent of the defendant rendered judgment for \$50 in favor of the plaintiff. *Held*, That as the only available error was in the assessment as above, the court had authority, with the defendant's consent, to render judgment for a sum in excess of the verdict, thereby granting the plaintiff in that respect all that he claimed, instead of remanding the cause for a new trial.

5. Errors alleged to have occurred in the assessment of damages must be assigned in the motion for a new trial.

ERROR to the district court for Johnson county. Tried below before BROADY, J.

Daniel F. Osgood, for plaintiff in error.

A. M. Appelget, and *S. P. Davidson*, for defendant in error.

MAXWELL, J.

This is an action brought by the plaintiff against the defendant in the district court of Johnson county to recover the penalty for exacting usurious interest. There are fifteen counts in the petition, the transactions extending from 1884 to 1886, and the amount claimed to be due being \$3,195.

The defendant in his answer: First, denies the facts stated in the petition; and second, pleads the statute of limitations as to the first, second, third, and fourth, counts of the petition. On the trial of the cause the jury returned a verdict for \$16.60 in favor of the plaintiff. The plaintiff filed a motion for a new trial, and assigned as the third ground of error that "There is error in the assessment of the amount of the recovery in this, that the defendant admitted the receiving from the plaintiff of \$21.50 usurious interest, whereas the verdict is for only \$16.60." The court overruled the motion for a new trial, and as there was an admission by one of the officers of the bank of having

received \$21.50 usurious interest, judgment was rendered against the defendant with its consent for the sum of \$50.

No exceptions were taken to the instructions asked or given, and but few exceptions to the evidence. The questions before the court therefore are to a great extent those of fact. The testimony of the plaintiff, upon which the right to recover to a great extent depends, is vague, indefinite, and unsatisfactory. He was a farmer doing a large amount of business, evidently, and kept an account with the defendant. This seems to have been frequently overdrawn, and when his attention was called to the fact, he would give a note for the amount thus overdrawn. He evidently was unaccustomed to the mode of conducting business in a bank, and was unable or at least did not give an intelligible statement of all his transactions with the defendant. This seems to have been caused entirely by his lack of business experience.

W. A. Wolf was called as a witness by the plaintiff, and testified that he was cashier of the defendant, and had been since July, 1883. He was then asked:

"Will you produce the discount register and bank blotters for the years 1884, 1885, and 1886?"

The record then proceeds:

A. I think they are here on the table. [Books produced and identified as plaintiff's exhibit.] These are the books I believe; the discount journal from July, 1883, to 1886. [Book identified as plaintiff's exhibit.] There are three books, called the day blotters, showing the transactions of the bank from July, 1883, to February 12, 1887. [Identified as plaintiff's exhibits, B, C, and D.]

This witness was afterwards called by the defendant and testified without objection to the several items of account with the plaintiff as they appeared by the books above referred to, and such items were offered and received in evidence practically without objection. On cross-examination of the witness he testified in substance that the books in

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question had not been kept by himself but by other employés of the bank, and that he testified from the books. It is now contended that these entries are mere memoranda, and that the witness not having made them could not use them to refresh his memory. The rule no doubt is that at common law, entries and memoranda made in the usual course of business by clerks and other persons, may be received in evidence after the death of the person who made them; but if the person who made them is living, he must be called or his deposition taken. (*Halliday v. Martinet*, 20 Johns. 168; *Butler v. Wright*, 2 Wend. 369; *Hart v. Wilson*. Id. 513; *Nichols v. Goldsmith*, 7 Id. 160; *Sheriden v. Smith*, 2 Hill, 537.) The statute, however, has changed the common-law rule. Sec. 346 of the Code provides that: "Books of account, containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under the following circumstances, subject to all just exceptions as to their credibility: *First*—The books must show a continuous dealing with persons generally, or several items of charges at different times against the other party, in the same book. *Second*—It must be shown by the party's oath, or otherwise, that they are his books of original entries. *Third*—It must be shown, in like manner, that the charges were made at or near the time of the transaction therein entered, unless satisfactory reasons appear for not making such proof. *Fourth*—The charges must also be verified by the party or the clerk who made the entries, to the effect that they believe them just and true, or a sufficient reason must be given why the verification is not made."

It will thus be seen that where the books are otherwise unobjectionable, it is unnecessary to call the party or clerk who made the entries, if a sufficient reason is given why such verification is not made. As to what constitutes a sufficient reason, it is unnecessary to determine, as the question is not raised. Had proper objections been made at

the outset to the entries in the books, no doubt the person who made the same would have been called, or his absence accounted for; and thus a sufficient reason been given for his failure to verify the books. The probabilities are that the plaintiff believed that the books had been properly kept, and thus failed to raise any objection to them. But whatever the cause, he could not sit by and permit such evidence to be introduced without objection, and after the evidence is all in before the jury, and he has had the benefit of the same in his favor, raise an objection to its competency. This objection should have been made before the items of account were introduced in evidence, and it is now too late to raise it.

It is claimed that the books above referred to, show that the amount charged for the use of \$5,000, for sixty days, was usurious. We find no objection of this kind, however, in the motion for a new trial, the only error as to the amount of recovery alleged in that motion being \$21.50. This objection, therefore, cannot be considered. In overruling the motion for a new trial, the court in effect found that the jury had made a mistake in the computation of the penalty; that as the defendant had admitted that it had taken illegal interest to the extent of \$21.50, that therefore the plaintiff was entitled to recover that amount. This objection was sustained, therefore, by rendering judgment for twice that sum and more. Just why the court fixed upon \$50 does not appear; nor is it material, so long as it is as much as the record shows the plaintiff is entitled to recover. When the only available error is in the computation of damages, the court may, if the proof is undisputed on that point, or the facts are admitted, render a judgment, with the defendant's consent, according to such proof or admitted facts, notwithstanding a verdict for a lower sum, instead of granting a new trial upon that ground alone. It is the policy of the law to determine the rights of the parties in one trial, if it can be done consistently with the

Sloan v. Coburn.

protection and enforcement of the rights of both ; and a judgment will not be reversed for a mere technical error which caused no prejudice. The court, therefore, having granted the plaintiff all that he claimed, he is not in a position to complain. Whatever the actual facts may be as to usury in the case at bar, the record is not in such condition that we can say that the judgment of the court below is erroneous. It is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

WILLIAM G. SLOAN AND JONAS P. JOHNSON, PLAINTIFFS IN ERROR, V. WILLIAM COBURN, DEFENDANT IN ERROR.

[FILED MAY 31, 1889.]

1. **Fraud: SALE OF PERSONAL PROPERTY: EVIDENCE.** Where the grantor of personal property was heavily indebted at the time of the conveyance, and soon after the transfer made statements in derogation of the *bona fides* thereof on his part, in a contest between the grantee and the creditors of the grantor over the property, the creditors alleging the sale to have been fraudulent, such statements are proper to be proven for the purpose of showing fraud on the part of the grantor at the time of the conveyance, but not for the purpose of showing fraud on the part of the grantee, or of impairing his title.
2. **Attachment: REPLEVIN: DAMAGES.** Where property is replevied from an officer who has possession by virtue of a levy of an order of attachment, and the trial of the replevin suit results in a verdict and judgment in favor of the officer, his measure of damages is the amount due the attachment plaintiffs at the time of the levy of the order of replevin, (within the value of the property,) and not including writs of attachment which came into his hands after he had been divested of his possession by the replevin proceedings.

26	607
30	41
26	607
140	273
40	898
26	607
44	879
26	607
54	798
26	607
56	81

3. **Chattel Mortgage.** Where a debtor, for the purpose of securing a debt, conveys personal property to his creditor, giving him the possession thereof with authority to the creditor to sell the same and account to the debtor for the surplus after paying the debt so secured, together with the necessary expenses of sale, etc., the instrument by which the conveyance was made will be treated as a chattel mortgage as well between the grantee and the creditors of the grantor as between the parties to the transfer.
4. **Instructions** given to a jury upon the trial of a cause must be applicable to the evidence adduced.
5. **Verdict.** Evidence examined, and *held*, not to sustain the verdict.

ERROR to the district court for Douglas county. Tried below before DOANE, J.

Breckenridge & Breckenridge, for plaintiff in error, cited: *Wells on Replevin*, sec. 302; *Turner, Frazer & Co. v. Killian*, 12 Neb. 586; *Gray v. Earl*, 13 Iowa, 188; *Lefler v. Field*, 52 N. Y. 622; *Tucker v. Parks*, 1 Pacific Rep. 431; *Jones on Chattel Mortgages*, 2d Ed., 352, 353, 358; *Bonns v. Carter*, 20 Neb. 578; *Omaha Book Co. v. Sutherland*, 10 Id. 334; *Butts v. Privett*, 14 Pacific Rep. 250; *Grimes v. Farrington*, 19 Neb. 48.

Montgomery & Jeffrey, John L. Kennedy, and *Charles B. Keller*, for defendant in error, cited: *Richardson v. Steele*, 9 Neb. 486; *School District v. Shoemaker*, 5 Id. 36; *B. & M. R. R. Co. v. Young Bear*, 17 Id. 669; *Simpson v. Armstrong*, 20 Id. 512; *Hagan v. Lucas*, 10 Peters, 400; *Hunt v. Robinson*, 11 Cal. 262; *White v. Dolliver*, 113 Mass. 402.

REESE, CH. J.

This was an action of replevin brought by plaintiffs in error against defendant in error to recover possession of a stock of groceries and other property. It is substantially

agreed by counsel that on the 28th day of January, 1887, the firm of J. H. Johnson & Company, being indebted to plaintiff in the sum of fifteen hundred and forty dollars and fifty cents, transferred to plaintiff by bill of sale the property in question to secure the payment of said indebtedness. The property was immediately taken possession of by plaintiff under said bill of sale. Afterwards, and on the same day, other creditors of J. H. Johnson & Company sued out writs of attachment, and by virtue thereof the defendant, who was the sheriff of Douglas county, levied upon said property as the property of J. H. Johnson & Company, and took the same from the possession of plaintiffs. Thereupon plaintiffs brought their action of replevin. The trial was had in the district court to a jury, and a verdict was rendered in favor of defendant in error. Thereupon plaintiffs filed a motion for a new trial, which was overruled, to which ruling plaintiffs duly excepted. Judgment was then rendered on the verdict in favor of defendant and against the plaintiffs. The plaintiffs bring the case into this court by proceedings in error, and seek a reversal of the judgment upon the errors assigned in their motion for a new trial and petition in error. We will only examine such of the alleged errors as we deem material to this review, as upon new trial the questions omitted will not likely arise again.

It was and is contended by defendant in error that the transfer of the property made by J. H. Johnson & Company to Sloan, Johnson & Company, was fraudulent, and as a part of the evidence to sustain their theory of the case, they sought to prove certain statements made by J. H. Johnson after the transfer to Sloan, Johnson & Company. This evidence was objected to by plaintiff upon the ground, evidently, that after the transfer the statement of the vendor could not be received for the purpose of impairing the title of the vendee. The objection was overruled by the district court. It is shown by the record that at the

time of the ruling upon the objection, the court stated that the testimony was not received for the purpose of impeaching or any way impairing the title which had been acquired by the firm of Sloan, Johnson & Company, but for the purpose of showing the intention of J. H. Johnson & Company at the time they made the transfer. In this ruling of the court we think there was no error. In order to prove the transaction fraudulent, it must have been established that J. H. Johnson & Company made the transfer with the intent and purpose of hindering, delaying, or defrauding, their creditors in the collection of their claims, and also that the firm of Sloan, Johnson & Company had knowledge of or participated in this fraudulent design. While it was not enough to show that the firm of J. H. Johnson & Company were actuated by fraudulent motives, yet as a part of the case it was essential to show that fact, although in the absence of other testimony the title of Sloan, Johnson & Company could not be impaired thereby. (*Williams v. Eikenberry*, 25 Neb. 721.)

For the purpose of showing the sheriff's interest in the property at the time of the trial, defendant in error was allowed to introduce in evidence certain writs of attachment which came into his hands after the property was replevied by plaintiff. In this we think the court erred. (*Merrill v. Wedgwood*, 25 Neb. 283.)

It is not deemed necessary here to rediscuss this question. We are satisfied with the decision in the case referred to, and see no reason why the rule should be changed. Any other rule would place a plaintiff in a replevin suit brought against an officer, at the mercy of all other persons having claims against the debtor.

The instrument by which the property in question was transferred to Sloan, Johnson & Company was as follows:

"Know all men by these presents: That we, J. H. Johnson & Company, of the first part, for and in consideration of the sum of fifteen hundred and forty dollars and

fifty cents, lawful money of the United States, to us in hand paid at or before the ensealing and delivery of these presents, by Sloan, Johnson & Company, of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey, unto the said parties of the second part, their executors, administrators, and assigns, the following personal property, to wit: A general grocery stock, consisting of sugar, tea, coffee, canned goods, soap, cigars, tobacco, and such other goods as are usually kept in a retail grocery store; also a stock of salt and fresh meats; and all fixtures, including show cases, shelving, store furniture, etc., in the grocery store and meat shop of said J. H. Johnson & Company, at No. 701 and 703 Phil Sheridan street, in the City of Omaha, Neb.; the intention being to include herein all personal property of all kinds in said store and shop and wareroom adjoining; also, one black horse, four light bay horses; also, two two-horse delivery wagons and two sets double and one set single harness; also one buckboard, one cutter, and one sewing machine.

"The said Sloan, Johnson & Company are to take immediate possession of said property, to sell the same at retail in the usual course of trade, and shall account to said J. H. Johnson & Company for any surplus over the said above mentioned sum, and the expenses of sale, etc.; belonging to us, and now in our possession at the place last aforesaid.

"To have and to hold the same unto said parties of the second part, their executors, administrators, and assigns, forever. And we do for ourselves, our heirs, our executors, and administrators, covenant and agree to and with the said party of the second part, their executors, administrators, and assigns, to warrant and defend the sale of said property, goods, and chattels, hereby made unto the said party of the second part, their executors, administrators, and assigns, against all and every person and persons whomsoever.

"In witness whereof we have hereunto set our hands and seal this 28th day of February, 1887."

On the trial it was shown that the date here mentioned was a mistake. It should have been the 28th day of January, 1887, that being the day upon which the instrument was made.

Upon the trial, at the request of defendant in error, the court gave to the jury the following instruction, number three of the series asked by defendant in error:

"3d. You are instructed that while a creditor may obtain payment in full of his claim to the exclusion of other creditors, provided he takes no more than will be sufficient to satisfy his claim, provided he does not collude or agree with his debtors to hinder, delay, or defraud, other creditors; yet, if in procuring satisfaction of his claim he go further, and tie up other property so that it hinder or delay other creditors, such arrangements would be contrary to the statutes of Nebraska and therefore void; and if you find from the evidence that the transfer from J. H. Johnson & Company to Sloan, Johnson & Company, in this case was of such a nature, and did so hinder and delay other creditors in the collection of their debts, your verdict should be for the defendant."

In giving this instruction we think the learned district judge erred. It seems to us quite clear that the instrument above copied can be treated only as a mortgage on the property described; and that when Sloan, Johnson & Company procured the satisfaction of the indebtedness due to them, their title to the property would be thereby extinguished. It is true the legal title was conveyed to them as in any other chattel mortgage, but evidently for the purpose alone of satisfying or procuring the satisfaction of the claim due from J. H. Johnson & Company to Sloan, Johnson & Company. As soon as the indebtedness to Sloan, Johnson & Company was satisfied, the property would of necessity revert to J. H. Johnson & Company. By the instruction

the court informed the jury that if Sloan, Johnson & Company took more than would be sufficient to satisfy their claim, or if they tied up other property so as to hinder or delay other creditors, such an arrangement would be contrary to the statutes of this state, and their verdict should be for defendant in error. Assuming the instrument in question to be a chattel mortgage we know of no rule of law which requires a mortgagee to take no other property than simply sufficient to satisfy his claim. (*Grimes v. Farrington*, 19 Neb. 48.)

At the request of defendant in error the court also gave the following instruction, number four:

"4th. If you find from the evidence that at the time the bill of sale was given by J. H. Johnson & Company and it was understood and agreed that Sloan, Johnson & Company were to take possession of the stock of goods transferred by the bill of sale, and sell the same at retail in the usual course of trade, keeping up the stock by purchasing and mixing other goods with those transferred, and continuing the business indefinitely, paying clerk hire and other expenses out of the proceeds derived from the sale of the goods transferred, whereby the opportunity of creditors not secured to collect their debts is lessened or impaired, which arrangement was to continue until the net proceeds of the business amounted to sufficient to satisfy the claim, and confining the manner of sale to one particular mode not in conformity to the statute, you are at liberty to consider such facts, if proven, in connection with the other testimony, to ascertain whether or not the transaction was one made in good faith for the purpose only of securing plaintiffs' claim."

As seen by the instrument above quoted, it contains no provision authorizing Sloan, Johnson & Company to keep "up the stock by purchasing and mixing other goods with those transferred, and continuing the business indefinitely, paying clerk hire and other expenses out of proceeds derived

from the sale of the goods transferred * * * until the net proceeds of the business amount to sufficient to satisfy the claim." We have carefully examined the bill of exceptions throughout, and are unable to find any testimony tending to show that any such an agreement was made at the time of the execution of the bill of sale, or, in fact, at any other time. It is true that Mr. Johnson, of the firm of Sloan, Johnson & Company, when upon the witness stand, testified that such goods were added as were necessary to keep up the trade; that the business was carried on, the clerks were hired, etc.; but we find nothing that would warrant us in concluding that this was by virtue of any arrangement made prior to the execution of the bill of sale or at that time. It is true that such a course was pursued by Sloan, Johnson & Company, as was fully stated by Mr. Johnson when upon the witness stand; but by a reference to the dates, we find that on the 28th day of January the bill of sale or mortgage was executed; on that same afternoon or evening the attachment was levied upon the property and they were divested of their possession. On the next day they replevied the property from the sheriff. Knowing, evidently, that they would be held responsible for the full value of the goods replevied, they did what any other prudent business men would have done under similar circumstances; they supplied such goods as were necessary to keep up the trade until they could dispose of the goods replevied. But this can in no sense be charged back to an arrangement supposed to have been entered into at the time of the transfer of the property. We think, therefore, that the instruction was not applicable to the evidence adduced, and in giving it the court erred. Among other instructions asked by plaintiff in error and given by the court, we observe the two following, numbered three and four. They are as follows:

"3. You are instructed that the bill of sale from J. H. Johnson & Co. to Sloan, Johnson & Co. in question in this

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suit, is not fraudulent and void on its face; that is, by its terms; and unless you find from the evidence actual fraud, or an intent to defraud the creditors of J. H. Johnson & Company, and that fraud, or intent to defraud, participated in by Sloan, Johnson & Company, or known by them, or with reasonable means of knowing such fraudulent intent, if such existed on the part of J. H. Johnson & Co., your verdict should be for the plaintiff.

"4. You are instructed that it is the law that a debtor even in failing circumstances has the right to pay the *bona fide* demand of one of his creditors to the exclusion of others, and if you find that the bill of sale in question was given by J. H. Johnson & Co. to Sloan, Johnson & Co. to secure a *bona fide* indebtedness from J. H. Johnson & Co. to Sloan, Johnson & Co., and the same was taken in good faith by Sloan, Johnson & Co., for the purpose only of securing their claim, and without any intent on the part of Sloan, Johnson & Co., to defraud, hinder, or delay, the other creditors of J. H. Johnson & Co., or to aid J. H. Johnson & Co. so to do, then your verdict should be for the plaintiff."

It appears from the evidence that J. H. Johnson & Company were indebted to Sloan, Johnson & Company, in the sum of fourteen hundred and fifty dollars and fifty cents; that Sloan, Johnson & Company had befriended them, and upon the day on which the instrument above quoted was given, Sloan, Johnson & Company called the attention of J. H. Johnson & Company to certain damaging rumors which were being circulated in commercial circles in Omaha, and asked that they be secured in their claim. This J. H. Johnson & Company agreed to do. J. H. Johnson and J. P. Johnson, one of the plaintiffs, went to the office of an attorney in Omaha, and secured the bill of sale to be made. There is no proof anywhere that Sloan, Johnson & Company were actuated by any desire or purpose other than to cause their claim to be secured, in procuring the execution

of the instrument above referred to. There is no proof which would seem to indicate that they entertained any desire or purpose to defraud any of the creditors of J. H. Johnson & Company, or to assist J. H. Johnson & Company, in covering up their property. They accepted the security and took possession of the store and other property described in the bill of sale or mortgage, and had not the sheriff levied the orders of attachment upon it immediately after they took possession, there is nothing to show but that they would have disposed of the property to at least a sufficient amount to pay their claim, and that in as expeditious a manner, and with less expense, perhaps, than could have been done by an ordinary foreclosure. Had the instruction hereinbefore referred to not been given, we are not quite able to see how the jury could have arrived at the verdict which they did under these two latter instructions above quoted. In addition to the errors hereinbefore pointed out, we think the verdict is not sustained by sufficient evidence, and that a new trial should be granted.

The judgment of the district court is reversed. The cause is remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other Judges concur.

CHARLES W. HOXIE, PLAINTIFF IN ERROR, v. RICHARD IAMS, DEFENDANT IN ERROR.

[FILED MAY 31, 1889.]

1. **TRIAL: EVIDENCE: QUESTION FOR JURY.** A question of reasonable time arising upon parol evidence, within which a purchaser of certain school-land leases was required to go upon, examine the land, and decide whether it proved to be of the

Hoxie v. Hama.

quality as represented, there being a dispute as to the facts, and conflict of evidence, *held*, to be a question of fact and not of law.

2. **Real Estate: CONTRACT OF SALE: BREACH: FORFEITURE.** In an action for the breach of a contract to take back certain school-land leases purchased by the plaintiff from the defendant, and repay the purchase price therefor, in case the land should not prove to be of the quality as represented, *held*, that the fact that at the time that the plaintiff offered to reassign the leases to the defendant and demanded the performance of the contract, there was rent or interest past due on the said leases for which they might have been declared forfeited by the state board of educational lands and funds, constituted no defense to the action.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Selleck & Lane, for plaintiff in error, cited: *Parsons* on *Cont.*, 7th Ed., vol. III, pp. 357, 358; *White v. Day et al.*, 56 Iowa, 250; *Hammons v. Bigelow*, 17 N. E. Rep. 193; *Nelson v. Nelson*, 38 N.W. Rep. 134; *Babcock v. Case*, 61 Pa. St. 427; *Morse v. Brackett*, 98 Mass. 210; *Taymon v. Mitchell*, 1 Md. Ch. Dec. 497; *Tisdale v. Buckmore*, 33 Me. 462; *Bugbee v. Haynes*, 43 Vt. 476.

Chas. H. Foxworthy, for defendant in error, cited: *Ledyard v. Manning*, 1 Ala. 153; *Oelrichs v. Artz*, 21 Md. 524; *Stanton v. Small*, 3 Sandf. (N. Y.) 230; *Edwards v. Fire Ins. Co.*, 3 Gill. (Md.) 176; *Johnson v. Cranage*, 7 N. W. Rep. 190; *Lamb v. Jeffrey*, 41 Mich. 719; *Hageman v. Sharkey*, 1 Howard, (Miss.) 277.

COBB, J.

This was an action brought in the district court of Lancaster county by the defendant in error against the plaintiff in error on a written contract set out in the petition. The plaintiff in said action alleges in his petition that on July 6, 1885, he entered into a contract with the defendant therein for an exchange of certain property, by the terms of which

the said plaintiff, for the consideration thereafter expressed, agreed to convey to the said defendant certain real estate in the city of Lincoln, and in consideration therefor defendant on his part contracted to convey to the plaintiff two certain school-land certificates for the east half of section thirty-six, in township fourteen, of range seventeen, in Custer county, and his interest therein; that pursuant to the terms of said contract, and in consummation thereof, plaintiff did convey, by request of defendant, by good and sufficient deed, to one Mary M. Hoxie, the real estate mentioned in said agreement, and defendant on his part assigned to plaintiff the said leases and his interest in the said east half of section thirty-six, in township fourteen, range seventeen; that the said defendant, to induce plaintiff to make the said sale and exchange and to accept the said leases to said land in trade for his property in Lincoln, falsely and knowingly represented to plaintiff that two-thirds of said land was good, fair, tillable land, he, the said defendant, well knowing that said land was not as he represented; and on the date of said trade and exchange defendant executed and delivered to plaintiff a written guaranty in words and figures following:

“LINCOLN, NEB., July 6, 1885.

“This is to guarantee to Richard Iiams that two-thirds of east half of section 36, town 4, range 17 west, is good, fair, tillable land; and should it not so prove, I agree to take it off his hands at six hundred dollars.”

And relying upon said representations, and said guaranty, plaintiff made the said trade. He further alleges that the said land is not as defendant falsely represented and warranted it to be; that two-thirds of the same is not fair, tillable land, as defendant well knew, but instead, the whole of said land is rough and broken, and is not tillable land, to plaintiff's damage in the sum of six hundred dollars; that immediately on learning that the said land was

not as represented, plaintiff tendered to defendant a re-assignment to him of the said leases, and demanded in return the payment of the sum of six hundred dollars, and defendant then promised to pay plaintiff the said sum, yet defendant has since refused to take the said land and refused and still refuses to pay the said sum of six hundred dollars, and plaintiff is now ready to reassign to defendant the said leases on payment to him of the said sum; and that since the said trade and exchange, plaintiff has paid interest on the said land, as provided by the leases, in the sum of \$22.50, etc.

The defendant for answer denied each and every allegation in the said petition contained.

There was a trial to a jury, with a verdict and judgment for the plaintiff. The defendant brings the cause to this court on error.

I do not understand this to be an action for specific performance of a contract to purchase and pay for land. It certainly was not so understood by either of the parties, nor by the court in which it was tried. Neither do I understand it to be an ordinary action for the rescision of a contract; but rather an action for the breach of a contract. Rescission contemplates the placing of both parties to the contract in *statu quo*. Neither the petition nor the contract sued on in the case at bar contemplates this.

The contract is very short, and it seems to me easy to be understood, especially so in the light of the undisputed parol evidence. In a trade between the parties, the defendant for a consideration sufficient in law, but which need not be further described, assigned to the plaintiff certain leases of school lands. The plaintiff being unacquainted with the character of the land covered by the leases, and the same being situated in a distant part of the state, was unwilling to accept of the said leases in the progressing trade without a personal guaranty that the land was, two-thirds of it, good, fair, tillable land, and that if he took the

leases in the trade, and the land did not prove to be of that character, the defendant would take it back, or off his hands, and pay him six hundred dollars, which sum seems to have been mutually considered the value of the land, if it proved not to be as represented by the defendant. To meet this requirement of the plaintiff, the written instrument sued on was executed and delivered to him by the defendant.

Now let us examine this instrument as set out in the petition, it being the same as that introduced in evidence on the trial. It makes no reference to the leases, but its terms are confined to the land itself. It makes no guaranty that the plaintiff will be satisfied with the land, nor that he shall find it to be of the character named; but it guarantees the fact that the land is of such a quality, and should it not so prove, that the defendant will take it off of the plaintiff's hands at such a sum. No limitation is placed upon this obligation as to the time when the defendant will discharge the obligation to take the land off of the plaintiff's hands, should it not prove as guaranteed.

There was parol evidence upon the trial both on the part of the plaintiff and on that of the defendant, as to some understanding or agreement as to the plaintiff's going upon or examining the land. It was received without objection, hence no question of its admissibility arises here. Plaintiff in error, in the brief, contends that the question arising upon this evidence whether there was a parol agreement between the parties that the plaintiff should go upon the land, inspect it, and decide whether it proved to be of the quality as represented or not, and the further question whether the plaintiff did make such examination and decide within a reasonable time, was a question or were questions of law, which the court erred in submitting as questions of fact to the jury.

In the case of *Gilbert v. Moody*, 17 Wend. 354, cited by counsel for plaintiff in error, it was held that "Where

there is no dispute as to the facts, it is for the court and not the jury to say what shall be deemed a *reasonable time*" in which for a purchaser of chattels at a public vendue to remove them without being chargeable for storage. Also in the case of *Pratt v. Farrar*, 10 Allen, 519, cited by counsel, it was held that, there being no dispute as to the facts, it was a question for the court whether forty-eight hours was a reasonable time to allow for a tenant at sufferance to remove from the lower story of a house after notice. These cases and others of like holding turn upon the point that there is no dispute as to facts. In the case at bar there is a sharp conflict of evidence, and a dispute as to the facts; therefore, in so far as the question arose upon the parol evidence, it was a question for the jury. Had the question arisen upon the written instrument, it would have been one for the court to decide; but so far as the face of the instrument is concerned, no question of reasonable time is presented. Upon the whole, I think that the following instruction given by the court on its own motion is correct, and sufficient on that subject:

"Third—If you find from the evidence: First, that the plaintiff received from the defendant the guaranty offered in evidence as a part of the consideration, or as an inducement to exchange property for school-land leases for the land mentioned in said guaranty; second, that said land was not two-thirds good, fair, tillable land, as represented in said guaranty; third, that within a reasonable time after the exchange, the plaintiff notified the defendant that said land was not as guaranteed, and tendered back the leases and demanded his six hundred dollars; fourth, that the plaintiff since acquiring full knowledge of the nature and quality of the land, has done no act ratifying or confirming said exchange; then your verdict should be for the plaintiff."

As this instruction sufficiently presented that branch of the case to the jury, there was no error in the refusal of the

court to give the fourth instruction asked by the defendant.

Plaintiff in error also contends that in order for the plaintiff in the court below to recover, he must have reëssigned the said leases to the defendant, and not only so, but that he must have kept the same in force by paying the accruing interest thereon up to the time of such assignment. In this view the defendant presented the following instruction :

"3. You are instructed as a matter of law that for the plaintiff to recover in this action, it is necessary for him to reëssign or cause to be reëssigned the said leases to defendant; and if you find from the evidence that said leases have become forfeited and of no value through the default or neglect of the plaintiff, then you should find for the defendant."

The plaintiff, when on the stand as a witness in his own behalf, testified that he had gone upon the land and examined it; that he went to the defendant and reported to him just what it was; that defendant told him that he would pay him the money for the land. "He said that he would take the land; if it was rough and not as he represented, why he would pay me the money just as soon as he got money." I quote further from his testimony, as contained in the bill of exceptions :

Q. Did you tell him you were ready to reëssign the leases to him?

A. Yes, sir.

Q. And are you now ready to reëssign the leases to him?

A. Yes, sir.

Upon cross-examination, he stated that it was inside of a year after the making of the trade that he went to the defendant as above, and told him how he had found the land, and that he would not take it, offered to reëssign the leases to him, and demanded the six hundred dollars.

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Plaintiff stated on his reexamination he had paid \$22²⁵/₁₀₀ interest on the said leases and property. On his re-cross-examination he testified as follows:

Q. Why did you pay \$22.50 in Custer county?

A. I sent and paid that before I had seen the land.

Q. What was your object in paying it?

A. To keep it from being forfeited.

Q. You knew it had got to be paid up or it would be forfeited?

A. Knew that it had to be paid up, yes.

It appears from the copies of the school-land leases contained in the bill of exceptions, that the leases bear date October 9, 1883. The rent reserved in the leases (called interest in the testimony) amounts to \$11.20, payable semi-annually in advance on the first days of January and July of each year. The leases also contain the following clause: "And in case of any default on the part of the said lessee in the observance of the covenants and agreements of this lease, the said premises with the improvements shall forfeit and revert to the state of Nebraska; or the Board of Educational Lands and Funds may require the payment of said rents, and collect the same, notwithstanding such default and abandonment of said premises."

Upon this evidence then, the court refused to give the above instruction, but gave the following:

"Sixth—You are instructed that the fact that interest was overdue upon leases when plaintiff made demand upon defendant, if such fact appears from the evidence, would be immaterial; and the fact that the evidence shows these leases have been forfeited since the commencement of this action, renders the fact of forfeiture immaterial in this action."

While it may well be doubted that it was the duty of the plaintiff under the circumstances to protect the leases by paying the rent, that point would only become material in case the state board of educational lands and funds should

have seen proper to take the proper steps and declare leases forfeited. While the language of the lease is, that "in case of any default on the part of the said lessee * * * the lease shall forfeit," yet I understand that the meaning of this provision is that in case of such default, the board of educational lands and funds may declare the lease forfeited. I find no evidence in the bill of exceptions that such action has been taken by the said board. The leases then were in force at the time that plaintiff offered to reassign them to the defendant; and in this view of the case the court was right in refusing the instructions asked by the defendant and giving the instruction which it gave.

The point is not urged in the brief that the evidence as to the character and quality of the land is not sufficient to sustain the verdict, nor do I think that it could have been successfully done.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

CLEVELAND COÖPERATIVE STOVE CO., PLAINTIFF IN
ERROR, V. HOVEY & PECK, DEFENDANTS IN ERROR.

[FILED MAY 31, 1889.]

1. **Trial: EVIDENCE.** From the written exhibits used on the trial, *held*, that a jury would be justified in finding that the defendants did not act in good faith with the plaintiff, and were liable.
2. **Principal and Agent.** An agent who sells goods subject to the approval of his principal, is not thereby a general agent; and proof of what such agent said or did in relation to the goods after the order has been filled, is not admissible against his principal without proof of his authority to bind his principal in that manner.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Sawyer & Snell, for plaintiff in error, cited: Benjamin on Sales, 4th Am. Ed., secs. 181, 1040; *Rodgers v. Phillips*, 40 N.Y. 519; *Stafford v. Walker*, 67 Ill. 83; *Barton v. Kane*, 18 Wis. *262; *Downer v. Thompson*, 6 Hill, 208; *Smith v. Pettee*, 70 N. Y. 13; Bishop on Contracts, sec. 679; *Farrar v. Peterson*, 52 Ia. 420; *Stoddart v. Warren*, 7 Reporter, 517; *Stilwell v. Mut. Life Ins. Co.*, 72 N. Y. 385.

Harwood, Ames & Kelly, and *Edson Rich*, for defendants in error, cited: Parsons on Contracts, vol. 1, p. 565; *Williams v. Flood*, 6 Western Rep. (Mich.) 175; *Downer v. Thompson*, 6 Hill, 208; *Keith v. Herschberg Optical Co.*, 48 Ark. 138.

MAXWELL, J.

This action was brought by the plaintiff against the defendants for their written order for certain stoves at a price named in the order. The order as set out in the petition is as follows:

"It is understood that all claims for shortage or allowance must be made within ten days after receipt of goods; also, that there is no agreement other than is specified herein that shall be binding on the Cleveland Coöperative Stove Company, and they reserve the privilege of rejecting or accepting this order, or any part thereof, upon receipt of same at their office.

"No. 52.

August 30, 1885.

"*Cleveland Coöperative Stove Company*: Please ship to Hovey & Peck, Lincoln, Neb.:

6-5 Zip.....	\$2 80
6-6 Zip.....	3 45

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2-25 Social.....	\$7 75
2-27 Social.....	8 25
1-14 Casino.....	9 00
3-40 Silver Cannon Base.....	5 00
2-44 Silver Cannon Base.....	6 55
1-48 Silver Cannon Base.....	8 30
2-19 New Fine Arts.....	8 10
2-11 New Lorian Plain.....	5 85
1-24 Hot Wave.....	14 50
1-24 New Midnight B. B.....	15 25
1-26 New Midnight B. B.....	17 65
2-8 Black Hawks.....	9 25

Chicago Delivery

Ent.

"Ship at once.

"Terms due, February 1st, 1886.

"Left copy.

"Signed in duplicate. HOVEY & PECK.

"GEORGE E. KEFER, *Agent.*"

The answer contains a purported copy of the order, which is similar to the above except "2 No. 8 Black Hawks," cook stoves; and the following: "Any of the above stoves on hand February 1st to be carried by us until sold." Why these words were in the copy and not in the original does not appear. On the trial of the cause, the jury returned a verdict for the defendants, and judgment was rendered thereon.

The testimony shows that a large part of the goods described in the order were shipped from Cleveland, Ohio, with other goods as part of a car load to Omaha, on the 21st of September, 1885, and were reshipped from Omaha to the defendants on the 1st day of October of that year. The defendants say that they refused to receive the goods, but if so, they failed to give the plaintiff notice of that fact. On the 12th day of October, 1885, the plaintiff shipped the remainder of the goods described in the order, which were received about the 27th of that month. Thereupon the defendants sent the following letter to the plaintiff:

"LINCOLN, NEB., Oct. 28, 1885.

"*To the Cleveland Coöperative Stove Co.:* GENTS—Your several invs. for goods at hand. The stoves came to hand but so far we have refused to take them from R. R. Co. Last part of the goods ordered, and some not ordered, came to hand in a wrecked condition. Shortly after, a lot of castings, badly broken, came straggling in. And to close up with, lot stoves came from Chicago. These goods please consider subject to your order.

"Yours truly, HOVEY & PECK."

It will be observed that the defendants make no objection in the above notice that the goods were not shipped in time for the fall trade; yet this was one of the principal defenses relied upon in the trial of the case; nor do they object to the goods as not conforming to the order, the only objections being that the first shipment came to hand in a wrecked condition, and that a lot of castings were badly broken. The bill of lading at Omaha shows that three of the stoves were injured when reshipped, but to what extent does not appear, nor does it appear to have been the fault of the plaintiff. To the defendant's notice of October 28 the plaintiff sent the following answer:

"November 28, 1885.

"*Messrs. Hovey & Peck, Lincoln, Neb.:* DR. SIRS—Yours of some time ago advising us that the goods you ordered from us that we shipped were still in charge of R. R. Co. and refused by you. You stated that there were some goods not ordered by you. We say that we did not ship you a single stove which does not appear on your written order, August 30, the same being signed by you. The goods were all in perfect condition when shipped by us, and of course we are not responsible for transportation breaks. These are our most desirable goods—such as we have been constantly short of and of which we could have sold 5,000 more than we have if we could have made them.

Of course it's your privilege to decline to receive them of R. R. Co.; and when the bills mature we shall expect them to be paid promptly. We are sorry for this occurrence, and think the better way for you would have been to receive the goods, and we furnish, as a matter of accommodation to you, the necessary repairs at half price. Still, of course, you are to judge of this. Still we hope you may succeed in getting your pay of goods from R. R. Co.; or perhaps you can get settlement from them for damages and take the goods; in which case specify repairs wanted, and we will furnish as above. Hoping you are having a good season's trade, and that you may have occasion to favor us with your further orders, we are

"Yours respectfully,

"(5) CLEVELAND COÖP. STOVE CO. (M.)"

Nothing further was done until February 1, 1886, when the plaintiff sent a statement of account to the defendants for payment. To this the defendants answered:

"This bill is for more than we owe you.

"Yours truly, HOVEY & PECK."

The testimony shows that the only dealings the defendants had with the plaintiff were the transaction in relation to the goods in question. The conduct of the defendants certainly tends to show the want of good faith on their part, and a jury would be warranted in finding that the defendants had accepted the goods subject to any damages they may have sustained by reason of breakage, if any, and should pay for the same. The first shipment of goods must have been received in Lincoln as early as the 3d of October, 1885; yet the defendants served no notice on the plaintiff that they would not receive the goods, and made no claim for shortage as provided in the terms of their own order. Good faith on their own part required them to act with reasonable promptness in notifying the plaintiff of any dissatisfaction on their part, and the cause of the same.

On the trial of the cause, Hovey, one of the defendants, was permitted to testify to conversations he had with the agent of the plaintiff after the stoves had been received in Lincoln. The questions and answers are as follows:

Q. You may state what conversation, if any, you had with the plaintiff's agent, Mr. Kefer, regarding a settlement of this claim after you had refused to accept the stoves shipped.

The court: You may state what was done by the agent here.

Witness: Shall I relate anything he said to me?

The court: Yes; state all there is about it.

A. Why, he simply told me he was sorry the case happened as it was. He was a man we dealt with a good deal, being a resident of the town, selling goods on commission; we tried to help him. After the trouble with the stoves came to his knowledge, he came to me and said he would try and dispose of them.

This evidence was objected to, the objection overruled, and proper exceptions taken to the ruling of the court.

The court also permitted one Palmer Way to testify that Kefer, the agent of the plaintiff, after the order had been filled, offered to sell the stoves in question to him. This testimony is clearly erroneous. There is no testimony in the record tending to show that Kefer had any general authority in the matter. So far as appears, he was a mere special agent of the plaintiff to take orders for goods, which, if approved by the plaintiff, were to be filled. There is no testimony even that Kefer was such special agent at the time testified to as above by Hovey and Way. There was no apparent authority of Kefer to act in the premises, and the testimony in question was clearly inadmissible. The question here presented was before this court in *Howell v. Graff*, 25 Neb. 130, and the authority of the agent denied.

There is something suggestive in Hovey's testimony that "he [Kefer] was a man we dealt with a good deal," as his

own testimony shows that he purchased no other goods from the plaintiff than those in controversy in this case. The record also shows that a number of questions were propounded by the judge to witnesses, which seem to have been prejudicial, but to which no exceptions were taken and which cannot be considered.

The judgment of the district court is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

THE other Judges concur.

26	630
43	736

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
PLAINTIFF IN ERROR, V. CLARA STARMER, DEFEND-
ANT IN ERROR.

[FILED MAY 31, 1889.]

1. **Negligence.** The evidence is examined, and *held*, sufficient to sustain the finding by the jury of negligence on the part of plaintiff in error, and the absence thereof on the part of defendant in error.
2. **Injuries to Person: DAMAGES.** Where in an action for damages by reason of a personal injury, the court instructed the jury among other things that in case they found for the plaintiff in the action they could take into consideration bodily pain and suffering, loss of time and reduction of plaintiff's ability to earn money in her business and calling; the instruction was sustained as being applicable to the evidence produced on the trial.
3. **Instructions: EXCEPTIONS.** The ruling of the district court refusing to give an instruction asked must be excepted to in order to justify the supreme court in reviewing it.
4. **The Verdict and judgment** *held* to be not excessive under the evidence.

ERROR to the district court for Adams county. Tried below before GASLIN, J.

Marquett & Deweese, for plaintiff in error, cited: *U. P. Ry. Co. v. Adams*, 33 Kas. 427; *Clark v. Mo. Pacific Ry. Co.*, 35 Id. 352; *Gorton v. R. R. Co.*, 45 N. Y. 664; *Terry v. Jewett*, 78 Id. 338; *Flemming v. R. R. Co.*, 49 Cal. 256.

C. H. Tanner, for defendant in error, cited: 24 Central Law Journal, 284; *Sherry v. New York, etc., R. R. Co.*, 10 N. E. Rep. 128; *Loucks v. Ry. Co.*, 31 Minn. 526; *Bitner v. Utah Cent. Ry. Co.*, 11 Pacific Rep. (Utah) 620; Rorer on Railroads, vol. 2, p. 1089, and note; *Bennet v. N. J. R. R. & T. Co.*, 7 Vroom, (N. J.), 225.

REESE, CH. J.

This action arose out of a collision between a train of cars and a buggy, in which defendant in error and her father were riding, while attempting to cross the railroad track in the city of Hastings at the crossing of said track and Lincoln avenue, a public street. Defendant in error filed her petition in the district court, alleging the facts of the collision and injury to herself, claiming that the accident was caused by the negligence and carelessness of the railroad company, its agents, and servants, in not sounding the whistle nor ringing the bell for the crossing, etc., and alleging the absence of negligence on her part.

Plaintiff in error answered denying any carelessness on its part, and pleading contributory negligence on the part of defendant in error. The line of plaintiff's road runs through the city of Hastings from east to west, and the crossing where the collision occurred is on the railroad track in the avenue which runs north and south. The plaintiff and her father were in a buggy driving south across

the track. Both sides of the street as it approaches the crossing were occupied by buildings, some of which were constructed by plaintiff in error, and which interfered with the view up and down the track until the persons seeking to cross came near to the track.

The north track was the side-track, where cars were switched back and forth and sometimes left standing. One of these cars stood on this north side-track, east of the wagon crossing, and extended into the street, some of the witnesses say, five or six feet; and others say its entire length; but the wagon crossing itself was not interfered with by this car. This north track was about twelve feet distant from the south one, and on the second track, box cars were being pushed backwards to the west by the switch engine; and it was these cars and engine that the buggy that defendant in error and her father were riding in, collided with. The foregoing facts were substantially conceded by both parties. The trial was had to a jury, and resulted in a verdict in favor of defendant in error; a motion for a new trial was filed, which was overruled, and a judgment rendered on the verdict. Plaintiff in error now presents the cause to this court by proceedings in error.

It is contended by plaintiff in error—

First—That there was no proof of negligence on its part. *Second*—That there was contributory negligence on the part of defendant in error. *Third*—That the trial court erred in its instructions to the jury. *Fourth*—That it erred in refusing to give instructions asked by plaintiff in error. *Fifth*—That the verdict was excessive.

These questions will be noticed in their order, but for convenience the first and second may be taken together. There was a conflict in the testimony as to whether the usual signals were given as the engine and cars approached the crossing, and whether any brakemen were on the train which was being backed by the engine, and whether proper precautions were taken by the father of defendant in error,

who was driving the horse attached to the buggy in which they were riding, before trying to cross. A number of witnesses testified positively that they heard the whistle and the ringing of the engine bell as the cars approached the crossing, and that a brakeman was on the front end of the front car, which was a box car, as the train came to the crossing; while upon the other hand, a number of witnesses testified as positively on behalf of defendant in error that there was no brakeman on the train; that the bell was not rung; and that they heard no whistle. It was shown with sufficient clearness that defendant in error and her father approached the crossing with the horse on a walk, and that as they approached the track, their speed was checked, either by the voluntary action of the horse, or by the driver, and that at no time prior to their crossing the first track could they see the approaching cars, owing to the obstruction which had been built near the track by plaintiff in error and the box car which projected into the street; that after the horse had crossed the north track and passed the car, it saw the approaching cars, and turned sharply to the right, nearly parallel with the track on which the cars were moving, when the buggy was struck, crushed down, and defendant in error with it, and was dragged along by the side of the track, when she claimed to have received the injuries complained of in her petition. An ordinance of the city of Hastings was also introduced which required plaintiff in error to keep a flagman at the crossing for the purpose of notifying persons who desired to cross, of approaching cars; but no flagman was there.

It must be conceded that upon a part of these questions the testimony seems to preponderate in favor of the theory contended for by plaintiff in error on the trial; yet we do not apprehend that they would necessarily have been decisive of the case in plaintiff's favor had they been found favorable to it. Suppose the whistle had sounded at the crossing of the next avenue east, more than a block away,

(and that is as near as is claimed,) and that the bell was being rung at the east end of the train, which consisted of from two to six cars, (the witnesses differing as to the number,) and that there was no brakeman on the front car, and no flagman at the crossing as required by the ordinance, then we could not say that there was not sufficient to sustain the finding of the jury by its general verdict.

The instruction given to the jury and of which complaint is made, was as follows: "In case you find for the plaintiff you can only find actual, proximate, and not remote, speculative, or exemplary damages; but you can take into consideration bodily pain and suffering, loss of time and reduction of her ability to earn money in her business and calling." It is insisted that this instruction was inapplicable to the facts, and misleading to the jury. This conclusion is based upon the contention that there was no evidence to support the instruction. To this we cannot agree, but will reserve our discussion of the question involved until further on in this opinion.

It is next insisted that the court erred in refusing to give to the jury an instruction requested by plaintiff in error on the trial. This contention must be disposed of by saying that no exceptions were taken to the action of the court in that behalf, and therefore it cannot be reviewed.

As to the contention that the verdict was excessive, we are not entirely free from doubt. It is conceded that defendant in error was confined to her room for but a few weeks, if so long; that no bones were broken; that she returned home with her father, who resided some distance in the country, on the evening of the accident, and soon after engaged in her business of teaching school, and so continued up to the time of the trial, which was some ten months thereafter. But it was shown that a somewhat severe and painful injury was received upon one of her limbs above the knee; that her nervous system was severely shocked at the time of the accident, so much so as to destroy consciousness

Bowie v. Spalds.

for some time; that for nearly all the time intervening between the injury and the trial, she had suffered pain in the injured limb; that her nervous system was badly and probably permanently injured, so much so as to deprive her of the ability to sleep, and to perceptibly impair her health, which condition might become more painful and burdensome, as the physician who examined her testified. These facts, when taken in connection with the further consideration that her prior condition, weight, etc., were testified to by her family and neighbors, as well as her condition at the time of the trial, at which she was present and before the jury, render it difficult for us to say that the verdict was excessive. This evidence was also sufficient to warrant the court in giving the instruction complained of, as hereinbefore referred to. Finding no error in the record, the judgment of the district court must be affirmed, which is done.

JUDGMENT AFFIRMED.

THE other Judges concur.

HENRY H. BOWIE, PLAINTIFF IN ERROR, V. C. C. SPAIDS,
DEFENDANT IN ERROR.

[FILED MAY 31, 1889.]

26	636
30	41
26	636
43	403
26	636
46	118
26	636
61	586

1. **Instructions.** "If an instruction assume the possible existence of a state of facts which the jury have no right to find, there being no evidence, it is error." (*City of Crete v. Childs*, 11 Neb. 253.)
2. —. Where, upon a jury trial, an instruction is given by which it is sought to include the whole of the case necessary to a verdict in favor of one of the parties to the action, all elements necessary to the conclusion should be embodied in the instruction; otherwise it should not be given.

ERROR to the district court for Buffalo county. Tried below before HAMER, J.

Calkins & Pratt, for plaintiff in error.

J. E. Gillespie, and *Marston & Nevius*, for defendant in error.

REESE, CH. J..

Defendant in error filed his petition in the district court of Buffalo county—to which this cause had been appealed from a justice of the peace—in which he claimed judgment against plaintiff in error for the sum of \$28, due as a balance on account for fruit and ornamental trees alleged to have been sold to plaintiff in error in the year 1885.

Plaintiff in error, by his answer, admitted the signature to an exhibit attached to the petition, to be his genuine signature, but alleged that the same had been changed, after it was signed, by the erasure of the name of Spaulding & Co. as payees and the insertion of the name of defendant in error in its stead, which change had been made without his knowledge or consent. (This exhibit is nowhere to be found in the record; but we infer that it was the original order for the trees.) The delivery of the trees was denied, and it was alleged that the order therefor was given to Spaulding & Co., and not to defendant in error, and that defendant in error had no interest in them at the time, to plaintiff's knowledge, he at that time representing himself as the agent of Spaulding & Co.; that although the order had been made by him, the trees had not been delivered in good order, and he had refused to receive them; that thereupon it was agreed by plaintiff in error and Spaulding & Co., through their agent, Alden Ferris, that plaintiff in error should take the trees, plant them out, and pay for as

many as should be alive on the first day of August, 1886; and that they were received upon that condition and no other. All averments of the petition not admitted, were denied. A jury trial was had which resulted in a verdict and judgment for \$27.00 in favor of defendant in error, and upon a new trial being denied, the cause is brought into this court for review by proceedings in error.

Upon the trial it was contended by defendant in error that in the sale of the trees he acted for himself alone, and not as the agent of Spaulding & Co., and that Ferris had no authority to change the contract made in taking the order for the trees sold, while upon the part of plaintiff in error it was contended that defendant took the order as the agent for Spaulding & Co., and in doing so acted solely for them; that he so represented the fact to be at the time of the sale; and that the contract was changed by them through their agent prior to the delivery of the trees. Instructions asked by plaintiff in error were refused, and the action of the court in so refusing is assigned for error; but as they refer to certain exhibits which are not found in the bill of exceptions, they cannot be examined. One of the instructions given, and to the giving of which plaintiff in error excepted, was as follows:

“The plaintiff’s right to recover depends upon the contract which he made, and whether he authorized Alden Ferris to represent him under the contract made with Bowie. Mr. Spaulds is entitled to recover the price of the trees unless he authorized Mr. Ferris to represent him and to modify the contract, in which case the price agreed upon was not due when suit was commenced in the lower court, and the plaintiff cannot now recover.”

In permitting this instruction to go to the jury, we think the learned judge who presided at the trial lost sight of the real issues, and thus inadvertently misled the minds of the jurors as to what they were. There was no evidence upon the trial that Ferris claimed any authority from de-

defendant in error for any part taken by him in the transaction. The whole tenor of the defense as to that part of the case was that in taking the order, defendant in error claimed and represented that he was acting as the agent of Spaulding & Co., and that he had no interest in the trees sold, and that such was the fact; that Ferris was also Spaulding & Co.'s agent, and had authority from that firm, and not from defendant in error, to change the contract or make a new one in its stead. The question of Ferris's authority to act for defendant in error was not presented either by the pleadings or evidence, and it should not have been submitted to the jury. (*City of Crete v. Childs*, 11 Neb. 252.)

Again, the instruction informed the jury that defendant in error was "entitled to recover the price of the trees unless he authorized Ferris to represent him and to modify the contract," in which case he could not recover. While covering the whole case, and excluding all considerations except those named, the instruction omitted the essential element that if defendant in error was the agent of Spaulding & Co. in taking the order, or, if such agency existed, and Ferris was also the agent of that company with authority to act, a changed or new contract would supersede the one originally made, and defendant in error could not recover. In an instruction of this kind, all the elements necessary to the conclusion should be included. (*Nelson v. Johansen*, 18 Neb. 180.)

The judgment of the district court must be reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

THE other Judges concur.

PETER B. BURGO, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

26	639
37	496
28	639
48	160

[FILED MAY 31, 1889.]

1. **Criminal Practice: CONTINUANCE.** Where an information was filed against A, charging him with an attempt to kill B, he pleaded "not guilty," and asked for a continuance of the case upon the ground that certain persons named, who resided out of the state, were necessary witnesses; "that he can prove by each of said witnesses that this affiant has suffered from hereditary insanity, to a greater or less extent, all through his life; that he inherited the same from his mother," etc., there being no allegation that there were no other witnesses by whom the same facts could be proved, and no allegation that at the time of the committing of the offense complained of the accused was unable to distinguish right from wrong in regard to the particular act charged: *Held*, That the affidavit was wholly insufficient to justify a continuance.
2. ———: **INSANITY: EXPERT TESTIMONY.** Where the opinion of an expert is sought upon the question of the insanity of the accused, the hypothetical questions to such expert must be so framed as to fairly reflect the facts admitted or proved by other witnesses.
3. **Instruction examined, and held, not erroneous.**

ERROR to the district court for Douglas county. Tried below before GROFF, J.

Offutt & English, for plaintiff in error, cited: *Pannell v. State*, 29 Ga. 681; *The King v. D'Eon*, 3 Burr. 1514; *People v. Vermilyea*, 7 Cowen, 388; *Brill v. Lord*, 14 Johns. 341; *Louisville, N. A., etc., R. Co. v. Falvey*, 3 N. E. Rep. 389; *Quinn v. Higgins*, 63 Wis. 664; *Cowan v. State*, 22 Neb. 525; *State v. Jones*, 50 N. H. 369.

Wm. Leese, Attorney General, for defendant in error, cited: *Maxwell's Crim. Procedure*, p. 566; 1 Russell on Crimes, note 1, p. 27, (9th Ed.) *Webb v. State*, 9 Texas Appeals,

490; Wharton on Evidence, (3d Ed.,) sec. 451; *Carr v. State*, 23 Neb. 749.

MAXWELL, J.

The plaintiff in error was informed against in the district court of Douglas county, for an assault upon his wife with intent to kill her, and on the trial was found guilty as charged, and sentenced to imprisonment in the penitentiary for fifteen years.

1st. The first error assigned is, that the court erred in overruling the motion for a continuance. The offense is alleged to have been committed on the 8th day of April, 1888; and the plaintiff was arrested on the next day. On the 14th of that month he was informed against, and on the 14th of May of the same year he was arraigned and pleaded not guilty. He thereupon filed the following affidavit for a continuance: "The affiant, Peter Benjamin Burgo, says, that he is not ready for trial at this term of the court, because of the absence of the following witnesses, viz.: Adeline Southerland, Lucy Bamberg, Sarah Moore, Henry Burgo, Frank Mackey, Lemuel Foote, Samuel Foote, T. E. Ellsworth, Sut. Scripture, Robert Terry, Charles Gilman, Robert Y. McColloch, Addie Costley, Oscar Seward, Pearly Huggy, Susan Bowles, Edward Bowles, and Gus. Bowles, which said witnesses all live out of this state, and who severally reside at and in the states particularly and specially stated in the affidavit of this affiant's attorney, Charles Offutt, filed herein.

"Affiant says that he can prove by each of the said witnesses that this affiant has suffered from hereditary insanity, to a greater or less extent, all through his life, and that he inherited the same from his mother, who was so insane for more than twenty years next before her death, which occurred five years ago; that she was unable to recognize any person related to or previously known to her; that for

many years before the twenty years, at which she became so insane as aforesaid, she was subject to temporary fits of insanity, during which she did not know what she was doing, and did not understand either the legal or moral effects of her acts; that at said time his mother attempted suicide.

"Affiant further says that during all his life, or the greater portion thereof, he has lived outside the state of Nebraska, and has only recently come to live in the city of Omaha; that he knows no one in the city of Omaha who will testify to the aforesaid facts, or any part thereof, and does not know any one in the said city who knows this affiant sufficiently well to be able to state what the true facts are in relation to the mental condition of this affiant. He further says that he believes that he can prove by each of said witnesses that this affiant has been for many years, and that he was at the time of the assault complained of, unable to distinguish right from wrong, and did not know the legal or moral effect or consequences of his acts. He further says that the affidavit is not made for delay, but in order that he may obtain a just and a fair trial."

The above affidavit wholly fails to state facts sufficient to entitle the affiant to a continuance. Leaving out of view the failure to allege that the persons named are intimately acquainted with the affiant, or any fact showing knowledge on their part, there is an entire failure to allege that he cannot prove the same facts by other witnesses in the state. The allegation that he has lived outside of the state the greater portion of his life, and that he knows no one in Omaha by whom he can prove these facts, falls far short of showing that he knows of no other witnesses who would testify to all that it is alleged the witnesses named would testify to. In addition to this, the fact that the affiant's mother was afflicted with insanity, will not justify him in the commission of crime, unless he also, at the time of committing the act complained of, was unable to distin-

guish right from wrong in regard to that particular act, which is not alleged. There is also an affidavit of one of the attorneys of the plaintiff in error in which he states in substance that he has but recently been called into the case; that he has not had time to correspond with the witnesses named to ascertain to what extent the hereditary taint of insanity affected the plaintiff in error; and that insanity was the only defense he intended to make.

There may be cases where it would be proper to continue a cause in order to obtain proof of hereditary insanity, but this is not one of them, and therefore the question does not arise, as there is no denial that the plaintiff in error could distinguish right from wrong in regard to the particular act complained of, when he committed the same. The court therefore did right in overruling the motion for a continuance.

2d. The second error relied upon is that the court erred in rejecting competent evidence. This refers to certain hypothetical questions propounded to Dr. Tilden. The questions as proposed contained a summary of but a portion of the evidence. "Thereupon the court said, 'Make your question conform to the facts, and then ask it—the facts admitted or already proved.'" In *Morrill v. Tegarden*, 19 Neb. 534, the objection was that the hypothetical questions did not reflect all the facts established by the witnesses. The court held, however, that the questions propounded did fairly reflect the facts of the case. (See also *O'Hara v. Wells*, 14 Neb. 403.) The necessity that the questions shall fairly reflect the facts proved or admitted, where it is sought to show insanity as an excuse for crime, is apparent. The plea is in the nature of confession and avoidance. The avoidance—the insanity—is to be shown by the testimony. How can an expert give an intelligible opinion upon that point, or one that the jury would be justified in acting upon, unless the inquiry reflects the proof on that question? There must be a fair statement of the case to render the

answer of any value whatever, as a partial statement, or one founded on mere fiction, would not fail to mislead the jury and probably cause a miscarriage of justice. The court did not err, therefore, in its ruling.

The writer, for himself, desires to say, after considerable experience and observation, that the ordinary medical expert's testimony, in regard to insanity, particularly where graduates of different schools of medicine are pitted against each other, is of the most unreliable character. It is evident that there is something radically wrong in the teachings of such schools in regard to insanity, or that knowledge on the subject is so limited as to place the student of that malady but little in advance of the average citizen. But whatever the cause, it is certain that if the person who commits an atrocious murder has been eccentric in his conduct, although perfectly sane, apparently, plenty of alleged experts can be found who will testify in effect that he was of unsound mind, while the same proof, if offered to justify robbery, larceny, burglary, or other ordinary offense, would be laughed out of court. It is probable that there is no better proof of the sanity or insanity of a person than the testimony of those who are intimately acquainted with him and have observed his conduct for months or years.

3d. Objections are made to the following instructions of the court to the jury :

" You are instructed that while the presumption of insanity has been raised, and the burden of proof to show the sanity of the prisoner is upon the state, yet, in order to acquit, it is not sufficient that you find the prisoner insane. If you find from the evidence, beyond a reasonable doubt, that at the time the defendant did the cutting he had a sufficient degree of reason to discern the difference between moral good, and evil, then he is responsible for his acts, and you should [so] find by your verdict. If, however, you find from the evidence that at the time the prisoner committed the offense charged he acted under an irresistible impulse,

and at the time was unable to distinguish between right and wrong, then you should acquit."

It is claimed that this enlarges the rule laid down by this court in *Wright v. People*, 4 Neb. 407, and *Hawe v. State*, 11 Id. 537, that where the individual accused lacks the mental capacity to distinguish right from wrong in reference to the particular act complained of, the law will not hold him responsible. This we think is a correct statement of the law. It is difficult to perceive, however, how the general statement in the instruction if "at the time [he] was unable to distinguish between right and wrong, then you should acquit," could injure the plaintiff in error. The broad application of the rule was in his favor, and is not ground of error. The loss by another of his reason, whether temporarily or irretrievably, whereby he ceases to have control of his own mind, actions, and conduct, enlists our sympathies, and causes us to seek to ameliorate his condition; hence the asylums provided by the state for his welfare. And as he was unable to distinguish right from wrong, the state will not hold him accountable for a violation of its criminal law, there being no intent to violate the same, nor ability to resist the impulse.

It must not be forgotten, however that occasional oddity or hypochondria of the person committing the offense, or the fact that he possesses an ungovernable temper, must not be mistaken for insanity; nor can the accused, as in this case, where he retains his reason, rely for proof of his insanity upon the fact that one of his parents was at times afflicted in that manner. The proof in this case shows a wanton and deliberate effort of a husband to murder his wife. The proof shows the act to have been premeditated and the attempt deliberately made. There seem to be no extenuating circumstances in the case, and there is no material error in the record. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

COBB, J., concurs.

REESE, CH. J.

I agree to the judgment, but not to the reflections contained in the latter part of the second division of the foregoing opinion.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR, v. TERRANCE CLARK, DEFENDANT IN ERROR.

SAME v. CHARLES HENKLE.

SAME v. WILLIAM M. DUNKLE.

SAME v. CHARLES THOMAS.

SAME v. THOMAS F. JORDAN.

SAME v. HEINRICH STANLEY.

[FILED MAY 31, 1889.]

1. **Injuries to Person: PLEADING: PETITION.** Where a petition charged several defendants jointly with operating a railroad construction train in a negligent and careless manner, by negligently running it at a high rate of speed through and by a herd of cattle, which were near the track over which the train was passing, whereby a part of the cattle which came on to the track were run over, and the train derailed and thrown from the track, and by which the plaintiff, who was riding thereon, was injured, it was held, that the district court did not err in overruling a motion to require a more specific statement in the petition by showing which one of the defendants was operating the road, if either one; or if all, whether jointly or severally; which one employed the train men, and which was charged with the alleged negligence.
2. **Railroads: SPEED OF TRAINS: EVIDENCE.** It is not necessary to the admissibility of the testimony of a witness as to the rate of speed a train of cars was running at the time of an accident, that such witness should be an expert in the matter of the

speed of trains. Any person of sound mind and judgment, who has observed trains running or other objects in motion, and who has an opinion thereon based upon seeing the train at the time in question, is a competent witness upon the subject, the jury being the judges of the weight of his testimony.

3. ———: NEGLIGENCE. In such action it was held not to be error for the trial court to permit the introduction of evidence tending to show the unsafe condition of the track at the place where the accident occurred, as tending to prove negligence on the part of those in charge of the train.
4. ———: ———. An instruction in a case of the kind referred to that it was negligence on the part of those in charge of the train to run it at full speed over any part of the track known by them to be frequented by cattle, unless that part of the track was guarded, *held*, error.
5. ———: CONSTRUCTION COMPANY: INJURIES TO EMPLOYEES. Where a contractor undertook to lay the track upon a newly-constructed railroad for the railroad company owning or leasing the same, the company to furnish the construction train and the men necessary to operate it, they to be employed and paid by the company, to whom alone they were responsible while running the train, the contractor having no authority to control them in that behalf, it was *held*, that if by the carelessness of those in charge of the train while passing over the track, an employe of the contractor lawfully on the train, and without fault or negligence on his part, was injured, the railroad company owning and controlling the movement of the train would be liable for the damages sustained.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Marquett, Deweese & Hall, for plaintiff in error, cited: Maxwell's Pleading and Practice, 167; 2 Shearman & Redfield on Negligence, 478; *Grand Rapids & Ind. R. R. Co. v. Huntley*, 38 Mich. 537; *Union Pacific Ry. Co. v. Young*, 8 Kas. 658; *Sexton v. Cook County*, 114 Ill. 147; *Vigeant v. Scully*, 20 Ill. App. 437; Lawson, Expert and Opinion Evidence, 86; *Fairbank v. Hughson*, 58 Cal. 314; Beach on Contributory Negligence, 7; *Railroad Co. v. Jones*, 95 U. S. 439.

Pound & Burr, G. M. Lambertson, and Sawyer & Snell, for defendants in error, cited: *Frick v. St. Louis, K. C. & N. Ry. Co.*, 75 Mo. 595; *Bohan v. The Milwaukee, Lake Shore & Western R. R. Co.*, 58 Wis. 30; *Worthen v. Grand Trunk Ry. Co.*, 125 Mass. 99; *Patterson, Railway Accident Law*, 424; *Van Horn v. B. C. R. & N. Ry. Co.*, 59 Iowa, 33; *Hoppe, Adm'r, v. Chicago, Milwaukee & St. Paul Ry. Co.*, 61 Wis. 357; *Bowen v. N. Y. Cent. R. R. Co.*, 18 N. Y. 408; *C. & A. R. R. Co. v. Kellam*, 92 Ill. 245; *Brown v. N. Y. Cent. R. R. Co.*, 34 N. Y. 404.

REESE, CH. J.

These several causes were instituted in the district court of Lancaster county against plaintiff in error. The issues were formed separately, but when they were called for trial they were consolidated and tried as one case, the jury returning separate verdicts in each case, which were all in favor of defendants in error, and assessing to each the damages found due them. A motion for a new trial was filed, and upon the same being overruled, judgment was rendered. The causes as consolidated are now brought to this court by proceedings in error. The issues formed in the district court were substantially the same in all the cases, and may be briefly stated as follows:

The actions were all against the Nebraska & Colorado R. R. Co. and John Fitzgerald, and the Chicago, Burlington & Quincy Railroad Co., as defendants. It was alleged in the petition that the Nebraska & Colorado Railroad Co. was a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska, and that the defendant, John Fitzgerald, was the railroad contractor, and a resident and citizen of the state of Nebraska; and that the Chicago, Burlington & Quincy Railroad Co. was a corporation duly organized and existing under the laws of the state of Illinois; that said defendants, were, on the

19th day of October, 1886, in the course of the construction and completion of a railroad, and about two miles from the station of Deweese, in this state; that the plaintiff was employed by the defendant Fitzgerald at an agreed price of \$1.75 per day in laying track from the terminus mentioned, into the station of Laurence; that the said defendants were possessed of the locomotive, tender, and train of cars there-to attached of about sixteen in number; and at the time of the injuries complained of, the railroad company referred to had in their employ, and in charge and control of its train of cars, a conductor, engineer, fireman, and two brakemen, who were running the train from about one mile from the said station of Laurence, to the said station of Deweese, at a high and dangerous rate of speed, and at not less than thirty miles per hour. Some of the cars were flat, some of them box cars, and one water car, one engine and tender, and the train was carelessly and negligently made up for that trip by said agents, servants, and employés, of the said railroad company by running the engine backwards and by placing the said engine in the middle of the train, with about ten cars in front of said engine, and about six cars in the rear thereof, and with a box car in front, towards the said station of Deweese, with no cow-catcher on in front of the train; and while carelessly and negligently running the train at the great rate of speed mentioned, by the wrongful act, neglect, and fault, of defendants while they were engaged in managing and conducting the business of the said defendant, and without fault on the part of the plaintiff, the train ran into a herd of cattle near a high bridge, and the cars and all thereon in front of the engine were thrown down upon the ground below, a distance of about twenty feet, by reason of which the plaintiff was greatly injured, etc.

The defendants in the action filed their motion for a more specific statement of the cause of action, in the following particulars:

"1. To show which one of the defendants was in possession of the railroad mentioned in the petition at the time complained of; or, if all were in possession of it, whether they held it jointly or severally.

"2. Which one of the defendants was possessed of the locomotive, tender, and train of cars; and if all were possessed of them, whether jointly or severally.

"3. State which one of the railroad companies had in its employ the conductor, fireman, engineer, and brakemen referred to in the petition.

"4. To require the plaintiff when he states that the said railroad company was negligent through its agents and servants, to state which one of the railroad companies was referred to.

"5. To require plaintiff when he states that the employés of said railroad company, or one of them, had charge and control of the said engine and train of cars, to state which railroad company was meant."

This motion was overruled.

The cause being presented on error by the Chicago, Burlington & Quincy railroad company alone against the several plaintiffs in the court below, the first assignment of error is the ruling of the district court upon the motion referred to. By the petition the defendants in the action were jointly charged with the commission of the grievances referred to therein, and so far as appears upon the face of said petition, each was equally and jointly liable. It was evidently the purpose of the pleader to so charge. Knowing that the facts referred to in the motion were within the special knowledge and information of the defendants, the issues could be formed by answer, and under the provisions of section 429 of the Civil Code, judgment might be rendered against either defendant found liable, if any liability existed. After the motion for a more specific statement of the petition was overruled, the Nebraska & Colorado Railroad Company filed its separate answer, denying that

it was the owner of the locomotive and train of cars referred to, or had any control or management over it. It also denied that the train men were in its employ or under its control, and alleged that no cause of action was stated against it. The Chicago, Burlington & Quincy Railroad Company answered, alleging that it had leased the lines of the Nebraska & Colorado Railroad Company, and completed the construction of the same through a contractor, John Fitzgerald, the other defendant; that the line referred to in the petition was in process of construction, and the train of cars, and employes operating the same, were at the time of the accident complained of under the control and management of and subject to the orders of the said contractor, Fitzgerald, and alleging that whatever injuries the plaintiff received on account of the accident referred to, were received and incurred by them on account of their own negligence and carelessness, and not by reason of any fault of the said answering defendant; and alleging further that the petition set up no cause of action as against it. Fitzgerald filed his separate answer, admitting that he was the railroad contractor, and that the several plaintiffs were in his employ at the time of their injuries. He also admitted the making up of the train, the collision, etc., and alleged that whatever injuries the plaintiffs sustained were on account of their own carelessness and gross negligence, and not through any fault of his. To these several answers, replies were filed, and the cause proceeded to trial.

Upon the trial, defendant in error called a number of witnesses for the purpose of proving approximately the rate of speed at which the train was running at the time of the injury. Some of the witnesses so called were riding upon the train; others were not. None of them were experts in running trains. It is insisted that they were incompetent to testify, and that their evidence should not have been received. To this we cannot agree. The rate of speed at which a train is running is largely a matter of judgment

from observation. While a person with an educated judgment upon that matter would be perhaps a more satisfactory witness than one uneducated, yet we know of no rule which would prohibit the uneducated person from testifying as to his judgment in the matter. (*D. & M. Railroad Company v. Van Steinberg*, 17 Mich. 99; *C. B. & Q. R. R. v. Johnson*, 103 Ill. 512; *Penn. Coal Co. v. Conlan et al.*, 101 Id. 93; *Worthen v. Grand Trunk Ry. Co.*, 125 Mass. 99.) The question is more as to the *quality* of the testimony than as to its competency; and this matter was properly left to the jury for their consideration.

It was shown upon the trial that plaintiff in error entered into a contract with Fitzgerald by which he undertook to lay the track over that portion of the Nebraska & Colorado railroad from Edgar to Blue Hill, a distance of twenty-nine miles. The contract was in writing. By it, the work was to be done under the direction of the engineer of plaintiff in error, who was in charge, and whose orders the contractor was bound to obey implicitly. It was also provided that plaintiff in error should furnish all necessary engines and cars, and that the men should operate them. Aside from the contract, it was shown that so far as the rate of speed was concerned, and the manner of running the construction train, the conductor and his crew, who were the employes of plaintiff in error, acted independently of the contractor, his agents and servants, the conductor and crew being in the respect named responsible only to it. On the date named in the petition, the track-laying had reached within about a half-mile of Laurence when the noon signal was given and the work-hands boarded the train for the purpose of returning to Deweese, which was the first station to the east, for dinner. On the way back, as the train approached a bridge of considerable height, it was observed that a herd of cattle were near the track on either side, a part of which sought to cross in front of the train, when they were struck, a portion of the train de-

railed, and a number of cars which were being "backed" by the engine, and in and on which defendants in error were riding, were thrown from the bridge into the ravine below, the bridge being in part destroyed and the injuries complained of received. Some evidence was introduced which tended to show the bad condition of the track over which the train passed just prior to the accident. This was objected to and the objection was overruled, to which plaintiff in error excepted, and now assigns the ruling for error. In this we think the court did not err. It was alleged in the petition and sought to be proved upon the trial, that the train was running at an unusually rapid and dangerous rate of speed, so that it was impossible to stop the train in time to avoid the collision. The evidence was competent for the purpose of showing negligence on the part of plaintiffs' employes at the time of the accident, a part of which was the alleged dangerous rate of speed at which the train was running. As touching the question of negligence, the evidence was proper.

Upon the trial, the court, at the request of defendant in error, gave the following instruction:

"The jury are instructed that it is negligence for the employes of a railroad company, or of others having the control, management, and running, of a railroad train, having persons lawfully on board thereof to carry, to run such train at full speed over any part of its track known by such employes to be frequented by cattle, unless that part of the track is properly guarded."

In permitting this instruction to go to the jury, we think the district court erred. There is no doubt but that it would have been competent to instruct the jury that while running over that part of the track a greater degree of care should be taken than while passing over the other portions of the road, perhaps; but we know of no rule which would require the track to be guarded. Any other kind of care which would have secured safety, would have been suf-

ficient. Furthermore, the question of negligence was for the jury to decide under all the facts and circumstances proven.

The only other question which it is deemed necessary to notice, is as to the liability of plaintiff in error, assuming that all other necessary and essential ingredients of the case are proven. It is insisted that under the evidence Fitzgerald was an independent contractor, and under the rule laid down in *Hitte v. The Republican Valley Railroad Company*, 19 Neb. 620, plaintiff in error could not be liable. In that case, Judge COBB, in writing the opinion, says: "It appears * * * that the said road was unfinished and being constructed at the time of the said injury; that the engine and cars by which said injury was inflicted were in the care and custody and were being run, operated, and managed, by the servants and hired men of the said John Fitzgerald, and not of the defendant," the railroad company. Again, on page 624, it is said: "In the case at bar Fitzgerald was clearly an independent contractor; he had the use of the engine and cars of the defendant as a part of the consideration for the work performed by him, and if the engineer and fireman of the train which did the damage were borne upon the pay rolls of the defendant while working on the contract, as claimed by counsel for plaintiff, which does not fully appear from the evidence, doubtless their compensation was fully accounted for by the contractor to the company. I conclude, therefore, that the train, consisting of an engine, tender, and one or two flat cars, which struck and killed plaintiff's decedent, was not being run by nor under the control or management of the defendant company, and that the defendant is not bound to respond to any damage, if any, suffered through or by reason of the negligence of the engineer, conductor, or other persons, in charge of the said train."

In the case at bar we have an entirely different condition, so far as the management or running of the train was con-

cerned. The contractor had no kind of authority over the train crew. They were responsible alone to the plaintiff in error. Had the contractor directed the conductor to "slow up" the train before running into the herd of cattle, the conductor was not bound to obey the order. Had he directed the train to run at a less rate of speed upon its return trip to Deweese, the conductor was under no kind of obligation to obey him. He had no more authority over the conductor than had any other person upon the ground, and therefore could not be held liable for the negligence of the train men; while upon the other hand plaintiff in error would be held liable for all injuries which might result by their negligence or want of care. (Thompson on Negligence, 892, *et seq.*; *Sproul v. Hemmingway*, 14 Pick. 1; *Fletcher v. Braddick*, 2 Bos. & Pul. N. R. 182; *Wood v. Cobb*, 13 Allen, (Mass.,) 58.

Any other rule would place the contractor at the mercy of the servants of the company or person employing them, in a matter in which such contractor would have no power or authority to control their actions.

The question of the alleged negligence of plaintiff in error, and of the alleged contributory negligence on the part of defendants in error, is discussed to a considerable extent by the briefs of counsel; but as a new trial must be had, and as these questions are for the consideration of a jury alone, under proper instruction, we do not deem it expedient to examine them at this time. For the error in giving the instruction referred to, the judgment of the district court is reversed, and the cause is remanded for further proceedings according to law.

REVERSED AND REMANDED.

THE other Judges concur.

MASON B. DEWITT, GUARDIAN OF JOHN S. BEARD-SHEAR, PLAINTIFF AND APPELLANT, V. GEORGE MATTISON, DEFENDANT AND APPELLEE.

[FILED JUNE 13, 1889.]

Guardian and Ward. In an action by the guardian of a person alleged to be insane, to cancel a deed of conveyance of real estate, the court below found that there was a failure to prove insanity, and that the conveyance was valid. *Held*, That the finding and judgment were sustained by the proof.

APPEAL from the district court of Dixon county.
Heard below before POWERS, J.

W. E. Gantt, for appellant, cited: *Mathiessen v. McMahon's Adm'r*, 38 N. J. Law, 536; *Jackson v. King*, 4 Cowen, 207; *Anglo-Californian Bank v. Ames*, 27 Fed. Rep. 727.

Barnes Brothers, for appellee, cited: *Corbit v. Smith*, 7 Ia. 60; Field's *Lawyers' Briefs*, vol. 6, p. 343, sec. 437; *Behrens v. McKenzie*, 23 Ia. 333; *Franklin v. Kelley*, 2 Neb. 117; *Mulloy v. Ingalls*, 4 Id. 117.

MAXWELL, J.

The plaintiff brought an action against the defendant to set aside a certain deed of conveyance of real estate made by one John S. Beardshear to the defendant. On the trial of the cause the court found the issues in favor of the defendant and dismissed the action. The plaintiff appeals. He alleges in his petition, "That on the 24th day of July, 1886, and long previous to said date, John S. Beardshear was the legal owner and in possession of the following described premises, to wit: northeast quarter of northwest quarter of section twenty; east half of southwest quarter,

and northwest quarter of southwest quarter of section seventeen, except three acres off south side of northwest of southwest quarter of section seventeen, all of said land being located in township thirty-one, of range six east, in Dixon county, Nebraska; that on the said 24th day of July, 1886, and long previous thereto, the said John S. Beardshear was a person of unsound mind, and wholly incompetent to transact business, and that said insanity and incompetency to transact business as aforesaid still exists at this time; that on the 24th day of July, 1886, the said defendant, George Mattison, well knowing the condition of said John S. Beardshear, and while the said John S. Beardshear was not conscious of what he was doing, and was wholly incapable of transacting any business by reason of his mental condition, all of which was well known to said defendant, he, the said defendant, induced the said John S. Beardshear to execute to the said defendant, a deed of the said real estate hereinbefore set out and described; that said conveyance so executed was for a grossly inadequate consideration, the said defendant paying for said real estate, and for the crops at said date growing and being thereon, the sum of \$770, and assuming the payment of a certain mortgage for \$300 against said land, which mortgage is still unpaid and remains a lien upon said real estate; that said crops were of a value at least \$300, and the said defendant has converted the same to his own use and realized therefrom said sum of \$300; that said defendant has since the execution of said deed as aforesaid, removed from said real estate certain buildings and other property of the value of \$500, and converted the same to his own use; that the use of said real estate and the property so converted by the defendant to his own use amounts to a much greater sum than that paid by the said defendant as a consideration for said real estate; that the said real estate at the time of defendant's procuring said conveyance as aforesaid, and ever since, and now is, of a value of more than \$2,000, and that said

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conveyance was procured to be made and said property converted by said defendant for the purpose of defrauding the said John S. Beardshear out of the same; and demand was duly made for the reconveyance of said premises to said Beardshear; that on the 6th day of January, 1887, upon proceedings duly instituted in the county court of Dixon county, Nebraska, the said John S. Beardshear was adjudged to be a person of unsound mind, and thereupon, by an order of said court duly made on the 6th day of January, 1887, at Ponca, Neb., this plaintiff was appointed the guardian of the person and estate of the said John S. Beardshear, and duly qualified as such guardian."

The answer consists of a number of specific denials, and particularly denies that Beardshear was insane when he executed the deed in question. The testimony shows that Beardshear has resided in Dixon county for many years, and has a number of relatives in that county; that he was a capable mechanic, and for many years prior to the autumn of 1885, had followed the business of a carpenter and millwright during the summer seasons, and carried on a blacksmith shop on his farm during each winter. So far as we can judge by the testimony, he seemed to give general satisfaction to his employers in any business he engaged in. He was married many years ago, (the exact date does not appear,) and had a number of children, but the number and respective ages are not stated. There is some testimony tending to show that his married life was not entirely harmonious, and that some three years ago he with a brother-in-law had consulted an attorney in regard to a divorce. The cause of disagreement, however, could not have been very serious, if, indeed, it was more than the meddling of busybodies, as no action for divorce was instituted. Some of his relatives who testify in the case cast reflections upon the conduct of the wife, who is now dead, that seem to be uncalled for, and should have been omitted. If their own theory of the case is true, it is probable that

the wife had some difficulties to contend with, and perhaps overcome, as well as the husband; and imputations upon her conduct now that she cannot be heard, seem out of place; the only controversy being the mental condition of Beardshear at the time he executed the conveyance sought to be set aside.

In the autumn of 1885, Beardshear and a brother named George, went to the Black Hills. The former returned home in January or February, 1886, and went on to Ohio to purchase the necessary machinery for a saw mill which they were about to erect in the Black Hills. At that time both he and his wife conversed freely about selling the farm and removing to the neighborhood of the mill. The desire seems to have been to sell for cash and not on credit or for notes or other obligations. Beardshear spoke to the defendant about purchasing the farm, and he seems to have offered \$1,100 for it. Nothing was done, however, in relation to the sale, and Beardshear, after obtaining the machinery for the mill, returned to the Black Hills, and, with the other persons interested therein, erected the mill spoken of. A quantity of lumber seems to have been sawed there, but the sale of lumber was slow, and some time early in June, 1886, Beardshear sold out his interest in the mill to his partners and returned home. A few days before his return, his wife died and was buried.

There is some testimony also tending to show that a daughter had married a man who, it was claimed, was somewhat addicted to the use of intoxicating liquors, and that on that account Beardshear was opposed to the marriage. It also appears that there was a mortgage on his farm for \$300; that his wife had borrowed \$50 from the defendant, and had contracted a small debt at one of the stores, and that there was a doctor's bill of more than \$20. These troubles seem to have preyed upon Beardshear's mind and made him anxious to sell the farm and pay his debts. He evidently was in a condition of mind to make a foolish

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bargain; but the proof clearly shows that he was not insane, but capable of making a contract. This fact is clearly shown by the clear weight of testimony of the witnesses for the plaintiff, and it seems that it was scarcely necessary to have called witnesses for the defendant. This was done no doubt as a precaution, and to show that the sale in all respects was conducted fairly and without resort to underhand means. During the winter of 1885 and 1886, Beardshear had tried to sell the land in question for \$1,500. A number of persons seem to have been willing to pay that sum for it, but not in money. There was a life lease on a small part of the land in favor of Beardshear's mother-in-law, which seems to have been valued at \$200, and which the defendants purchased subject to; but whether this was considered in connection with the other proposals does not appear. It evidently was well known to some of the relatives of Beardshear, before he made the sale, that he was anxious to sell the farm, and the proposals which had been made for the purchase of the same, as well as the price that he was asking for it, were also evidently known. The crops during that year are shown to have been light and of but little value. Taking the entire testimony as to the value of the land, while the price paid was low, it was not so disproportionate to the true value as to invoke the aid of a court of equity for relief. It will be observed that there is no charge in the petition that the defendant resorted to deception or other improper means to obtain the land; the right to relief being based solely on the inability of Beardshear to make the conveyance. There is no offer to return the consideration paid or any part thereof.

If, therefore, the proof fails to establish such incapacity, then the plaintiff must fail in the action. The proceedings in the county court appointing a guardian, cannot be considered in the case, as they took place long subsequent to the execution of the deed in question. Beardshear seems to be a man easily influenced by stronger minds, and may,

from lack of motive, from lack of employment, or other cause, have become incapable of transacting business ; but that question is not before the court. The costs in the case are taxed at \$241.83. The record contains but 232 pages of testimony, and less than 300 pages in all, and it is difficult to perceive in what legitimate manner such a bill of costs could have been incurred. The remedy, however, is by a motion to retax. It is probable, too, that the ends of justice would be subserved by requiring each party to pay his own costs, and it is so ordered.

In other respects the judgment of the court below is right and is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

RED WILLOW COUNTY, PLAINTIFF IN ERROR, v. THE
CHICAGO, BURLINGTON & QUINCY RAILROAD COM-
PANY, DEFENDANT IN ERROR.

[FILED JUNE 13, 1889.]

1. **Railroads: TAXES.** Where real estate is in fact used for road-bed and right of way purposes at a railway station, and it is apparent that no more land has been taken than seems necessary for the present business and necessities of the corporation in the near future, such land, under the statute, is to be assessed by the state board, although all of such real estate may not be covered with railway tracks.
2. ———: ———. All real estate and personal property of a railway company outside of right of way and depot grounds, are to be listed by one of the principal officers or agents of such corporation and assessed by the assessor of the precinct where the property is situated.
3. ———: ———. A roundhouse of a railway company was assessed by the local assessor at \$10,000, and the railway company

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claimed that it had listed the same with the state board, which had levied taxes thereon that it had paid. The proof failed to show whether or to what extent the roundhouse was also used as a repair shop. *Held*, That unless it was also used as a repair shop, so as to make it such shop as well as a roundhouse, the assessment should have been made by the state board, and not by a local assessor.

ERROR to the district court for Red Willow county.
Tried below before COCHRAN, J.

R. M. Snively, for plaintiff in error.

Marquett & Deweese, for defendant in error.

MAXWELL, J.

This action was brought by the defendant in error against the plaintiff in error in the district court of Red Willow county to recover certain taxes paid by it to said county under protest. The second cause of action, which is most important, is stated as follows:

"On the — day of April, 1884, the assessor of Willow Grove precinct in said county, assessed the following described real estate owned by this plaintiff, to wit: commencing at southwest corner of southwest fourth, section 29, township 3, range 29 west, Red Willow county, Nebraska; thence north on section line between sections 28 and 29, township and range aforesaid, to a point 150 feet north of and at right angles with center line of the Republican Valley Railroad as located; thence west parallel with and 150 feet from said center line to a point about 590 feet west of east line of northeast fourth of southeast fourth of section 30, township and range aforesaid; thence southerly 100 feet to a point 50 feet perpendicularly and on north side of said center line; thence westerly parallel with and 150 feet distant from said center line to west line of northeast fourth of southeast fourth of section 30 in

said township; thence south to southwest corner of northeast fourth of said section 30; thence east on south line of said northeast fourth of southeast fourth of said section 30, to southeast corner thereof; thence east on south line of the northwest fourth of the southwest fourth of said section 29, to the southeast corner of said northwest fourth of southwest fourth of section 29; thence south on west line of southeast fourth of southwest fourth of said section 29, to south line of said southwest fourth; thence on south line of said section 29, to place of beginning in said precinct and county; with improvements thereon; for the sum of \$10,400 for the year 1884. The board of county commissioners of said county, on the — day of June, 1884, levied a tax thereon of \$342.14 for that year, being a levy among other taxes of $7\frac{7}{8}$ mills state tax, 14 mills county tax, and 5 mills district-school tax. Of the land above described, 40.75 acres is and constitutes a part of the depot grounds of said plaintiff, and was at the time of such assessment and levy a part of the depot grounds of and owned by said plaintiff at McCook station. The said land, without the improvements thereon, was assessed at \$400. The above described land at the time of said assessment and levy, had a roundhouse and store-house located thereon belonging to said plaintiff, and said roundhouse and store-house were assessed by said assessor at the sum of \$10,000. Said land owned by said plaintiff, with the improvements thereon, including the 179.75 acres, were returned as a sum total by said assessor, and entered on the tax lists. Said 40.25 acres, the depot grounds aforesaid, were returned by the plaintiff to the state board of railroad assessments of Nebraska, and were duly assessed by said board as depot grounds, with said improvements thereon, which assessment was afterward duly certified by the auditor of state to the county clerk of said county, and by him entered on the assessment rolls and tax list of that year, and were included in the value per mile of the property of said plaintiff.

"On the — day of June, 1834, in accordance with said assessment and valuation by said assessor of Willow Grove precinct as aforesaid, the board of county commissioners of said county levied upon said tract and the improvements thereon, as one body, the taxes above set forth, and also levied a tax on the valuation as certified by the auditor of state to the county clerk of said county, as hereinbefore stated. The tax levied on such property by virtue of the assessment made by said state board was paid by this plaintiff prior to the 1st day of January, 1886. By reason of the foregoing, the plaintiff was doubly assessed and taxed, for the year 1884, on said 40.25 acres, used as depot grounds, including a roundhouse and store-house thereon.

"On the 28th day of April, 1886, the plaintiff paid under protest, to the treasurer of said county, the taxes assessed by said assessor and levied by said board of county commissioners, being \$342.14, with interest thereon, \$33.83, amounting to \$375.97.

"On the 21st day of May, 1886, the plaintiff demanded in writing of the treasurer of said county the repayment of the taxes so paid under protest, which demand was rejected and refused.

"On the 21st day of May 1886, the plaintiff demanded of the board of county commissioners of said county, the repayment of said taxes, and filed with the county clerk of said county, its claim for the sum of \$125.50 county taxes so paid under protest, and asked the refunding of the same.

"On the 6th day of August, 1887, the board of county commissioners being duly assembled in regular session, and having said claim of the plaintiff for refunding of said taxes under consideration, refused to order said amount refunded, but rejected and disallowed the plaintiff's said claim.

"No part of said taxes have been refunded or paid, and there is now due and unpaid of county taxes from the de-

fendant to the plaintiff on the two causes of action set forth in plaintiff's petition, the sum of \$316.40, with interest thereon from the 28th day of April, 1886."

On the trial of the cause in the court below, judgment was entered in favor of the defendant in error.

Mr. P. T. Francis, the precinct assessor in 1883 and 1884, was called as a witness by both parties, and testifies that the total valuation of the railway property assessed by him in 1884, was \$10,400.

Q. What items enter into and make that valuation?

A. Two hundred acres of land, with roundhouse and store-house, and other buildings.

Q. What was the land valued at?

A. Two hundred dollars per acre.

Q. How many acres of land in that?

A. Returned by the county clerk, 200 acres, on the book here.

Q. Then what was the store-house and roundhouse assessed at?

A. Ten thousand dollars.

Q. That was the year 1884?

A. Yes, sir.

Q. This roundhouse and store-house is at the station of McCook, in Red Willow county, this state?

A. Near there.

Q. Now this 200 acres of land was assessed as one body?

A. It was, and so returned on the assessor's book. The description of the land and the amount is inserted in the book by the county clerk, from the records, and returned to the assessors for their appraisalment.

Q. The roundhouse and store-house of which you speak is situated on the land described on page two?

A. It is.

Cross-examination:

Q. As to page two, you say that your assessment of

\$10,400 was made on the 200 acres of land described on that page, and the roundhouse?

A. Roundhouse, and, I think, store-building; I am not certain; I couldn't tell the amount outside of the roundhouse; that I remember then was on the ground, and was part of the property I assessed; and there was some other property there.

Q. You cannot testify then that you actually assessed the store-building?

A. No, sir, I couldn't testify exactly as to that; but I see a memorandum on this page, which is in my handwriting, showing that there was a store-building, and was, I think, made at the time of my —

Q. Did this 200 acres of land include the right of way and depot grounds of plaintiff at said town of McCook?

A. No, sir; not so intended.

Q. This 200 acres of land assessed by you, then, was land owned by the company plaintiff, contiguous to their depot grounds?

A. Yes, sir, contiguous to the depot grounds, and owned — so listed by the county clerk, as belonging to the Republican Valley Railroad Company.

Q. Then in the year 1884, the roundhouse and this 200 acres was assessed at \$10,400, and in your assessment it was your intention not to assess the right of way of the company plaintiff and depot grounds?

A. No, sir.

Q. And they were not, in fact, included in your returns?

A. No, sir.

Q. You cannot testify as to what other or any other particular buildings that were assessed in that assessment but the roundhouse?

A. No, I couldn't, from memory, tell what there was on the ground at that time; all I have is this memorandum I have on the book here, containing roundhouse and store-building.

Q. How far is this roundhouse situated from the depot of plaintiff, the railroad company?

A. I couldn't tell you; I never measured the distance.

Q. It is considerably isolated from the depot of plaintiff, is it not?

A. I would estimate it at about 700 feet; but it is an estimation. If they have a plat there it would probably show exactly; but I have no plat of it and cannot tell you exactly.

Q. How much of this 200 acres of land that you assessed, did the plaintiff at that time have side tracks and depot tracks upon, if any?

A. I couldn't tell you; they had a track running to the roundhouse.

Q. That is the only track —

A. I wouldn't say whether that was the only track or not; I cannot remember. I don't remember the number of tracks. I know they had a track running to the roundhouse.

Q. In the year 1883 what improvements and land, if any, did you return included in your assessment, on page one, of \$10,000?

A. Of \$10,000?

Q. Yes, sir.

A. The south part of the southwest of the southwest quarter of section 29, town 3, range 29.

Q. Twenty-three and eighteen hundredths acres in that?

A. Twenty-three and eighteen hundredths acres.

Q. And what buildings or personal property?

A. The roundhouse; I couldn't tell whether any other property or not, but the roundhouse.

Q. The roundhouse is the only thing you can testify to?

A. The roundhouse I can testify to; that, I remember, was there — was the main building; that I am certain of; but what other property there was on the land, I am not certain of.

Q. Do you remember whether you included any depot grounds or right of way of plaintiff in that assessment?

A. It was returned to me by the county clerk on the assessor's book as a part of such section; I didn't suppose any land would be returned to assess that was right of way; the law distinctly says that the state board assesses that.

Q. Was that land included in the land that you did return?

A. No, sir.

Q. Were the depot grounds returned in —

A. No, sir; the depot grounds, as I understood, were on the other side of the track.

Q. Did you, in your assessment of 1883, page 1 of assessment book—did you assess or include in the assessment the depot buildings or any right of way?

A. No, sir.

Q. Then they were not valued by you at all in your assessment?

A. No, sir.

Sec. 39, art. 1, chap. 77, Compiled Statutes, provides: "The president, secretary, superintendent, or other principal accounting officers, within this state, of every railroad or telegraph company, whether incorporated by any law of this state or not, when any portion of the property of said railroad or telegraph company is situated in more than one county, shall list and return to the auditor of public accounts for assessment and taxation, verified by the oath or affirmation of the person so listing, all the following described property belonging to such corporation on the first day of April of the year in which the assessment is made within this state, viz.: the number of miles of such railroad and telegraph line in each organized county in this state, and the total number of miles in the state, including the road bed, right of way, and superstructures thereon, main and side tracks, depot buildings and depot grounds,

section and tool houses, rolling stock and personal property, necessary for the construction, repairs, or successful operation of such railroad and telegraph lines: *Provided, however,* That all machine and repair shops, general office buildings, store-houses, and also all real and personal property, outside of said right of way and depot grounds as aforesaid, of and belonging to any such railroad and telegraph companies, shall be listed for purposes of taxation by the principal officers or agents of such companies, with the precinct assessors of any precinct of the county where said real or personal property may be situated, in the manner provided by law for the listing and valuation of real and personal property."

There is no material conflict in the testimony. The land in controversy was not a part of the road-bed or right of way of the railway of the defendant in error. The most that can be said is that it was purchased by the railway company in anticipation that sometime in the future it might be necessary for tracks, etc. But this is not sufficient. Land to constitute road-bed and right of way must in fact be used for that purpose. This was the case in *B. & M. R. R. Co. v. Lancaster County*, 7 Neb. 33, and also in *B. & M. R. R. Co. v. Lancaster County*, 15 Neb. 251. In the cases cited the principal contention was that the ground was not all occupied by the railway tracks; in other words, the company had not covered the land with sidetracks. It did appear, however, that the land was used for the sole purpose of laying side tracks thereon, and that such tracks were being laid continuously, as demanded by the business of the company. The court held, therefore, that the whole would be treated as road-bed and right of way. A corporation will not be permitted, however, to purchase real estate for which it has no immediate use as a part of its right of way, and return the same for taxation as a part thereof, if in fact it is not used for that purpose. When real estate is in fact used for road-bed and right of

way purposes at a station, and it is apparent that no more land has been taken than seems to be necessary for the present business and necessities of the company in the near future, such land, under the statute, is properly assessed by the state board, although all of such real estate may not be covered with railway tracks, provided it is used for that purpose, and such tracks are being laid as fast as the business of the company demands it. In the case at bar, however, there is no proof that any of the land in question was used for right-of-way purposes, except the single track to the roundhouse. The plat introduced in evidence by the defendant in error shows another track over the land; but the proof does not show it to have been laid in 1883 or 1884; and even if it did, it would not render such a large amount of land road-bed and right-of-way.

There is no claim that other portions of the large tract in question were used for right-of-way. Such land, except 100 feet in width to the roundhouse, was to be assessed by the local authorities. The store-house was clearly taxable also. The proof fails to show whether the roundhouse was used for a repair shop or not. If so used, it was to be assessed by the local authorities; if otherwise, not.

The judgment of the district court is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

THE other Judges concur.

BELINDA PAGE ET AL., PLAINTIFFS IN ERROR, V. EDWIN
DAVIS, DEFENDANT IN ERROR.

[FILED JUNE 13, 1889.]

- 26 670
35 600
1. **Occupying Claimants: IMPROVEMENTS.** Occupying claimants of land who have made lasting and valuable improvements thereon, but have afterwards been evicted, are entitled to compensation for such improvements in all cases where they, or the persons under whom they claim title, derived the same from lawful public authority.
 2. ———: ———: **TAX TITLE.** The words, "such tax titles," and "such tax deeds," in the proviso of section 11, chapter 63, Compiled Statutes of 1887, do not relate to words of like import previously occurring in the chapter; and the word "such" being restrictive in its meaning, was evidently designed to apply to a particular class of tax deeds not described, and not to tax deeds generally. A person claiming title under a tax deed and making lasting and valuable improvements on the land, paying taxes, etc., is entitled to compensation for the same.
 3. ———: ———. While the intention of the law is that compensation shall be made for such improvements before a writ of restitution will be issued, yet where the application was properly filed, and an amended application made within six months afterwards, it will not debar a party from recovering.

ERROR to the district court for Douglas county. Tried below before NEVILLE, J.

A. N. Ferguson, for plaintiff in error.

Montgomery & Jeffrey, for defendant in error.

MAXWELL, J.

The defendant in error brought an action in ejectment against the plaintiff in error to recover the possession of certain real estate, and on the second trial obtained judgment for the possession of the same. The plaintiffs in

error soon afterwards made application for an appraisal of lasting and valuable improvements put on the land by them. In support of the claim, the plaintiffs in error introduced testimony tending to show that "the improvements on said premises consist of a one-story frame dwelling house 20 x 22 feet, one well, one cave cellar, one corn crib, one stable (shed) about 30 x 10 feet, and about fifty shade trees, and a quantity of shrubbery; that they put all these improvements on the land in question before the defendant in error brought suit to recover possession thereof; also, that they have paid taxes on the land from 1879 to and including 1885." There is also a stipulation "that one Abner French purchased said premises at the sale in 1879 for the taxes of 1877, and received a certificate of such sale; and that in February, 1880, he leased said premises to the defendant, John F. Page, who at once built the said house thereon; and that he made the other improvements thereon prior to January, 1882, and after February 6, 1881, at which date the said French conveyed said premises by warranty deed to the defendant Belinda Page; that the said French obtained a tax deed on his said tax certificate January 1st, 1882."

The action of ejectment was commenced November 11, 1885, and the second trial took place December 16, 1886; and a motion for a new trial was filed, which was overruled, and a request for the appraisal of the improvements filed. Afterwards, on the 2d of April, 1887, an amended request for the appraisal of the improvements was filed. This, with the first request, was overruled on the 9th day of July of that year, and within a year from that time proceedings in error were instituted in this court. It is stated in the brief of the plaintiff in error, and seems to be admitted by the defendant in error, that the cause of the delay in making the amended request for the appraisement of the improvements, was the death of Gen. O'Brien, the attorney of the plaintiff in error. The defendant in error contends that

there can be no recovery in this case for two reasons: *First*—As the plaintiff in error claimed under a tax deed, there is no provision of the statute for the appraisal of the improvements in such cases. *Second*—That the application was made too late to be considered.

Section 1, chapter 63, Compiled Statutes, provides: "That in all cases where any person claiming title to real estate, whether in actual possession or not, for which such person can show a plain and connected title, in law or equity, derived from the records of some public office, or from the United States, or from this state, or derived from any such person by devise, descent, deed, contract, or bond, such person or persons claiming or holding as aforesaid shall not be evicted or turned out of possession of such real estate, nor shall his claim or title be set aside or canceled by any court in any proceedings brought or commenced by any person setting up and proving an adverse and better title or claim to such real estate, until such person claiming as aforesaid shall be fully paid the value of all lasting and valuable improvements made upon such real estate by such claimant, or by those under whom he claims, and also for all taxes and assessments paid upon said real estate by such claimant, and the persons under whom he claims, with interest thereon, at the same rate of interest as provided by law for delinquent taxes, and for all sums of money paid by such occupant or claimant, or those under whom he claims, to redeem such real estate from any sale or sales for non-payment of taxes previous to receiving actual notice by the commencement of suit on such adverse title or claim by which such eviction or cancellation may be had, unless such occupant or claimant shall refuse to pay the person so setting up and proving an adverse and better title, the value of such real estate without improvements made thereon as aforesaid, upon the demand of the successful claimant as hereinafter provided."

Section 2 provides: "Any person in possession of or

claiming any real estate under a certificate of entry or under the homestead or preëmption laws of the United States, as well as the persons enumerated in the first section of this act, shall be considered as having sufficient title to demand the value of improvements and to demand the amount of all taxes and assessments paid by such claimant or those under whom he claims, under the provisions in the first section of this act."

The third, fourth, and fifth, sections relate to the appraisal and the report of the appraisers; the sixth and seventh to the final hearing and judgment. The eighth requires the successful claimant, who elects to pay for the improvements, to do so within such time as the court shall designate. The ninth and tenth relate to the procedure where the claimant elects to receive the value of the real estate without the improvements. Section 11 provides that: "This act shall apply to all suits now pending, or hereafter brought, wherein any of the claims or rights herein set forth shall be demanded and such demand for improvements or taxes may be made upon the overruling by the court of a motion for a new trial; or in case the suit is one in equity, then such demand may be made within three days after the entry of decree. In suits now disposed of, in which the unsuccessful occupant or claimant would have been entitled to the relief herein provided for, such occupant or claimant may make such application to the court within six months after this act shall become a law: *Provided, however,* That all of the provisions of this act shall be limited and restricted to those cases where the title to the real estate in controversy is derived from some source other than that which comes from such tax titles, tax certificates, tax receipts, or the payment of taxes by any person claiming any interest in or title to such real estate, by reason of such tax deeds, or tax titles, tax certificate, or tax receipts."

The words "such tax titles," and "such tax deeds," do not relate to any words relating to tax titles or tax deeds

which precede them in the chapter. In the second section it is declared in effect that parties who have entered lands under the preëmption and homestead laws, and have paid taxes on said lands, shall be authorized to demand the value of improvements made on said land and the amount of all taxes and assessments paid thereon. The first section provides substantially the same remedy as the second, and the only purpose in adding it seems to have been to prevent the possibility of the exclusion of cases arising under the homestead and preëmption laws. As the words, "such tax titles," and "such tax deeds," occur alone in the proviso to section 11, it is apparent that in the original bill, or in the act from which the bill was copied, these words did occur; but in what connection we do not know. The word "such" is restrictive in its meaning, and applies alone to certain tax deeds previously spoken of; and as no tax deeds or tax titles are referred to previous to the proviso of section 11, there is nothing to which the words referred to relate. Had the legislature intended to exclude all tax deeds and tax titles, it would no doubt have done so in plain, unequivocal language. There would seem to be no reason why a party who makes valuable and lasting improvements on land under a tax deed should not be paid for the same, as in other cases; and unless the statute expressly provides that no improvements shall be paid for, the claimant will be entitled to compensation. There is no such restriction in the statute, and the law should be applied alike to all — those claiming under tax deeds as well as others.

This is a remedial statute which declares that any person claiming title to real estate who "can show a plain and connected title, in law or equity, derived from the records of some public office," etc., "or derived from any such person," etc, * * * "shall be fully paid the value of all lasting and valuable improvements made upon such real estate by such claimant or those under whom he claims,"

etc. In other words, if a person derives title to real estate from the government through any of its agencies by which title purports to be conveyed, and makes lasting and valuable improvements on such real estate, he will be entitled to compensation therefor, and also for taxes paid, etc. This includes tax deeds. Such deeds purport to convey a title derived from the government through one of its agencies. It is unnecessary in this connection to enter into a discussion of the question of the effect of selling land for taxes or of the different forms of tax deeds. The statute seems to include all deeds issued under lawful public authority which purport to convey title to real estate, and clearly includes cases like that under consideration.

II. While the intention of the law is that these improvements shall be paid for before a writ of restitution will be issued, still, the failure to make the application for compensation before or at that time will not debar a party within, as in this case, six months afterwards, from making an amended application. This question was before the court in *B. & M. R. R. Co. v. Dobson*, 17 Neb. 455. In that case it is said in the syllabus that: "In an action against D., an occupant, for the possession of real estate, judgment was in favor of the plaintiff. D. removed the cause to the supreme court for review by proceedings in error, where the judgment of the district court was affirmed. After the filing of the mandate from the supreme court in the office of the clerk of the district court, and at the first term thereafter, the defendant filed a request for a jury to assess the value of lasting improvements made upon the land. *Held*, That the request was made within time—and not too late—and that the district court did not err in ordering the jury to be impaneled."

In *Shuman v. Willetts*, 19 Neb. 705, it is said: "This building appears to have been built in good faith by the occupants, who relied upon the decree of the district court. They now seek compensation for these improvements. As

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these improvements are firmly attached to the land and have become a part thereof, and were put thereon in good faith, under circumstances which it is not necessary here to discuss, we think every principle of equity would require that this compensation be made." If the party who succeeds in the action for the possession of the land obtains the property of another which he has placed on the land as the owner thereof, justice requires that the former shall pay the latter the fair value of the property thus obtained. The defendant in error therefore will be required to pay for the lasting and valuable improvements made by the plaintiff in error and those under whom he claims title.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other Judges concur.

MARY E. WILSON, PLAINTIFF IN ERROR, V. BUTLER COUNTY, DEFENDANT IN ERROR.

[FILED JUNE 13, 1889.]

1. **Taxes: VOID SALE.** Where a county treasurer sells lands for taxes which were not liable to taxation, and upon which no taxes were due, the tax purchaser may recover from the county the amount paid by him, with interest thereon.
2. ———: ———: **LIABILITY OF COUNTY.** Where a county has caused land which is not taxable to be assessed and taxes levied thereon under which the land is afterwards sold and attempted to be conveyed, and the county from year to year afterwards causes said land to be assessed and taxes levied thereon, the tax purchaser may pay such taxes to protect his supposed lien, and, upon the failure of his interest in the land, may recover the amount he has so paid, with interest thereon, from the county.

26	676
33	723
26	676
30	297

26	676
61	270

26	676
62	543

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3. ———: ———: ———. Where a county has caused certain real estate to be assessed, and taxes to be levied thereon, a tax purchaser may presume that the property was taxable, and is not required to make a further examination of that fact as a condition of maintaining an action against the county for the purchase money, and interest, and taxes thereafter paid to protect the tax lien which was believed to exist.

ERROR to the district court for Butler county. Tried below before POST, J.

Waldo Bros., for plaintiff in error, cited: *Schoenheit v. Nelson*, 16 Neb. 237; *Roberts v. Adams County*, 20 Id. 411; *City of Indianapolis v. McAvoy*, 86 Ind. 589; *Merriam v. Otoe County*, 15 Neb. 416.

Geo. P. Sheesley, for defendant in error.

MAXWELL, J.

This is a proceeding in error to reverse the judgment of the district court of Butler county. The case was submitted to the court below on the petition and answer, and judgment was rendered in the plaintiff's favor for \$74.17. The answer admits the allegations contained in the petition, "except the inferences and conclusions of law." It is alleged in the petition:

"1. That on or about the first Monday in February, 1873, the county commissioners of defendant furnished the assessor of Ulysses precinct of said defendant, a list of land which they represented to be taxable in said precinct; that said list wrongfully and erroneously contained the south half of the southeast quarter and the northeast quarter of the southeast quarter of section twenty-eight, in township thirteen north, of range two east, of the sixth principal meridian, in Butler county, Nebraska; that said assessor did value said lands, and returned said valuation with that of other lands, on or about the second Monday in April, 1873,

to the county clerk of said defendant; that on or about the first Monday of July, 1873, the county commissioners of defendant did levy taxes for the year 1873 on all taxable property in said Butler county, by mistake, and erroneously and wrongfully, including with said taxable property the aforesaid land; that said county clerk wrongfully and erroneously extended the taxes for the year 1873 against said land as follows, to wit, total \$9.40; that on the 1st day of May, 1874, said taxes for 1873 not having been paid, the same became delinquent; that on or about the first Monday in February, 1874, the county commissioners of defendant furnished the assessor of Ulysses precinct of said defendant a list of the lands which they represented to be taxable in said precinct; that said list, by mistake, and erroneously and wrongfully, contained said above-described land; that said assessor did value said lands and returned said valuation with that of other lands on or about the second Monday in April, 1874, to the county clerk of said defendant; that on or about the first Monday in July, 1874, the county commissioners of defendant did levy taxes for the year 1874 on all taxable property in said Butler county, by mistake, and erroneously and wrongfully, including with said taxable property the aforesaid lands; that said county clerk of defendant, by mistake, and erroneously and wrongfully, extended the taxes for the year 1874 against said land as follows, to wit, total \$16.99; that on the first day of May, 1875, said taxes for the year 1874 not having been paid, the same became delinquent; that on the first Monday in September, 1875, said taxes for the years 1873 and 1874 still remaining unpaid, said land was, by mistake, and erroneously and wrongfully, offered for sale by the treasurer of defendant, and on September 6, 1875, was, by mistake, and erroneously and wrongfully, sold by the treasurer of defendant to one F. A. Osborn for said delinquent taxes for the years 1873 and 1874, for the sum of \$28.15, which sum of \$28.15 the said F. A. Osborn paid

said treasurer therefor, that being the amount of taxes, interest, and legal expenses, claimed by the said treasurer of defendant to be due against said land for the years 1873 and 1874; that there was no tax due against said land at the time of said sale and purchase for the reason that said land at the time it was so assessed, and at the time of said levy and sale, was land belonging to the United States, and not liable to taxation; and that said land was, by mistake and erroneously and wrongfully, placed upon said tax lists for 1873 and 1874 by defendant's commissioners and defendant's assessors; that taxes for the years 1873 and 1874 were by defendant's commissioners wrongfully levied against said land; that said taxes for the years 1873 and 1874 were by defendant's county clerk, by mistake, erroneously and wrongfully, extended against said land; and that said land was by defendant's treasurer, by mistake, and erroneously and wrongfully, sold for taxes for the years 1873 and 1874, said land being at all the aforesaid times United States government land, and not liable to taxation.

"5. That said land was by defendant again, by mistake, and wrongfully and erroneously, assessed and taxed in the aforesaid manner, for the year 1875, and while said land still remained United States government land, and not taxable, said F. A. Osborn, to protect his said supposed tax title and lien, as compelled and required by law, paid, on May 5, 1876, to defendant's treasurer, as subsequent taxes on said land for the year 1875, the sum of \$23.92.

"6. That said land was by defendant again, by mistake, and wrongfully and erroneously, assessed and taxed in the aforesaid manner for the year 1876, and while said land still remained United States government land, and not taxable, and said F. A. Osborn, to protect his said supposed tax title and lien, as required and compelled by law, paid, on May 30, 1877, to the defendant's treasurer, as subsequent taxes on said land for the year 1876, the sum of \$16.42.

"7. That on or about the 8th day of May, 1878, the said

F. A. Osborn did sell, assign, and transfer, his certificate from defendant's treasurer of said tax sale and purchase, with all rights thereunder, unto one Charles L. Flint.

"8. That on or about the 8th day of May, 1878, the treasurer of defendant for and on account of said tax sale and purchase, did erroneously and wrongfully convey said land by tax deed unto said Charles L. Flint, which deed is recorded in book VII of deeds, at page 23, in the office of the clerk of said Butler county; that said Charles L. Flint and wife, by deed duly executed and acknowledged and recorded in said county clerk's office in book VII of deeds, at page 459, granted and conveyed unto one Elizabeth Murphy all their right and title to said land, and said tax title, and all rights thereunder; that said land was by defendant again, by mistake, and wrongfully and erroneously, assessed and taxed in the aforesaid manner, for the years 1877, 1878, and 1879, and while said land still remained the property of the United States, and not taxable, and said Elizabeth Murphy, to protect her said supposed tax title and lien, as compelled under the requirements and provisions of law, paid to defendant's treasurer as subsequent taxes on said land on November 17, 1880, the sum of \$34.09 taxes for the year 1877; also the further sum of \$23.57 taxes for the year 1878; and also the further sum of \$32.35 taxes for the year 1879.

"11. That said Elizabeth Murphy and husband, for the consideration of \$1,200, by deed, duly executed, acknowledged, and recorded, in said county clerk's office, in book X of deeds, at page 487, granted and conveyed unto Mary E. Wilson, the plaintiff, all right and title to said land and to said tax title, and all rights thereunder; that said land was by defendant again, by mistake, and wrongfully and erroneously, assessed and taxed in the aforesaid manner, for the years 1880 and 1881, and while said land still remained the property of the United States, and not taxable, and said Mary E. Wilson, the plaintiff, to protect her supposed

tax title and lien, as compelled under the requirements and provisions of law, paid the defendant's treasurer, as subsequent taxes on said land, on August 31, 1880, the sum of \$21.15, taxes for the year 1880, and on June 24, 1882, the further sum of \$25.35, taxes for the year 1881; that defendant by the aforesaid various assessments, levies of taxes upon and sale of said land for taxes, held out and represented said land to be, at the times aforesaid, taxable, and that it, the defendant, would give unto the purchaser, at said sale, and unto his assignees and legal representatives, a good and valid title and lien on said land for the purchase money paid defendant, and for all subsequent taxes paid to defendant by said purchaser, his assignees or legal representatives, under said tax sale and title; that all the aforesaid payments to defendant of taxes on said land were made by plaintiff and the aforesaid various persons whose rights plaintiff has acquired, to and for the use of defendant, by reason of the reliance of plaintiff and said various persons upon the said various representations of defendant, and under and by reason of mistake of fact, to wit, under belief that said land was taxable, caused by said representations of defendant, and by reason of said wrongful and erroneous acts of defendant and its officers; that the United States circuit court for the district of Nebraska, in a suit then therein pending, wherein Robert Blair, patentee of said land, was plaintiff, and Mary E. Wilson, this plaintiff, was defendant, decided that said land at the various times of aforesaid attempted taxations, was the property of the United States, and not taxable by this state nor the defendant herein; that plaintiff's aforesaid tax title was void and of no effect as against said land; and on February 27, 1884, rendered judgment ejecting this plaintiff from said land; that this plaintiff appealed from said judgment of ejectment to the supreme court of the United States, and that said appeal was by said supreme court of the United States dismissed, and this plaintiff ejected and put out of possession of said land."

Sec. 71 of the revenue law of 1869 (Gen'l Stat. 924) provides: "When, by mistake, or wrongful act of the treasurer or other officer, land has been sold contrary to the provisions of this act, the county is to save the purchaser harmless by paying him the amount of principal and interest to which he would have been entitled had the land been rightfully sold, and the treasurer, or other officer, and their sureties, shall be liable for the amount, on their bonds to the county; or the purchaser may recover the amount directly from the treasurer, or other officer, making such mistake or error."

In 1879 the section was changed to read as follows: (sec. 131, art. 1., chap. 77, Comp. Stat.) "When by mistake or wrongful act of the treasurer, or other officer, land has been sold on which no tax was due at the time, or whenever land is sold in consequence of error in describing such land in the tax receipt, the county is to hold the purchase[r] harmless by paying him the amount of principal and interest and costs to which he would have been entitled had the land been rightfully sold, and the treasurer or other officer, and their bondsmen, will be liable to the county to the amount of their official bond; or the purchaser, or his assignee, may recover directly of the treasurer, or other officer, in an action brought to recover the same in any court having jurisdiction of the amount, and judgment shall be against him and his bondsmen; but the treasurer, or other officer, and their bondsmen, shall be liable only for their own and deputies' acts."

It will be observed that both sections provide for repaying the purchaser at tax sale, the money which he has paid, with interest thereon and costs, where the land has been sold for taxes, where no taxes were due thereon. (*Roberts v. Adams Co.*, 18 Neb. 471; *Roberts v. Adams Co.*, 20 Id. 409.) The attorney for Butler county concedes that the county is liable for the amount paid for the tax purchase of the land, but contends that the county is not liable

for taxes thereafter voluntarily paid on such land. A party having a lien on real estate, or having reason to believe that he has such lien, by paying taxes to protect the same, cannot be said to have made such payments voluntarily, so as to preclude a recovery. The purpose is to protect his interest, as, if he failed to do this, the land would, in all probability, be sold, and his security be clouded or lost. This rule is constantly applied in cases of foreclosure of mortgage, and the courts have even given the mortgagee who paid taxes to protect the security, a right over prior incumbrancers whose liens the payment served to protect. (*Cook v. Kraft*, 3 Lans. 512; *Davis v. Bean*, 114 Mass. 360; *Barthell v. Syverson*, 54 Iowa, 160; 2 Jones on Mortgages sec. 1134.) This principle is distinctly recognized in *Young v. Brand*, 15 Neb. 601; *Southard v. Dorrington*, 10 Id. 122, and cases cited; and *Johnson v. Payne*, 11 Id. 271.

In *Schoenheit v. Nelson*, 16 Neb. 235, the question here presented was before the court, and it was held that a purchaser at tax sale may pay all taxes thereafter accruing which are legally chargeable against the land purchased and add the same to his claim in the enforcement of his lien.

The attorney for the county contends that as these taxes were not legally chargeable against the land, therefore the plaintiff and his grantors paid the same at their peril; and as the land was not taxable, that therefore there was no valid charge against the same, and there can be no recovery. We do not so understand the law. The objection is not to the validity of the taxes if levied on taxable real estate, but that they were levied on property which was expressly excepted by the constitution from taxation. The county caused the property to be assessed from year to year and levied taxes thereon, and held it out to the world as being taxable, and extended it on its record as such, and that certain taxes were due thereon which its treasurer from year to year received. The tax purchaser has a right to assume that the records of the county state the facts as they

actually exist, and rely upon them, and is not compelled to look elsewhere for evidence of their veracity. With what consistency can the county say in effect, "I assessed property and levied taxes thereon which you paid, and the money is now in the county treasury; but no taxes were due on such land, and you should not have paid the same, and having done so you must suffer the loss"? Such an answer would not avail between individuals, and should not be tolerated. The same rule of justice which prevails between natural persons, ought to obtain in dealing with corporations. The fact that the defendant is a county affords no justification for it to retain what it has no legal nor moral right to keep.

The case is entirely different from that of a tax payer who voluntarily pays a questionable tax without objection. In such case there can be no recovery because the party waives the objection by deliberately paying the amount claimed. He may have an object in this. The questionable tax may be of general benefit to the tax-payers of the county by reason of some great work of a public nature, the effect of constructing which would be to enhance the value of all the property within the county and add largely to its revenues. Or it may be that the tax in itself is just, although subject to attack from a legal standpoint. In either case the tax payer who voluntarily pays the amount charged against his property, thereby in effect admits its validity, and ordinarily cannot recover it back. The law for the protection of tax purchasers, however, is designed as an inducement to those who may purchase real estate upon which taxes are delinquent, by guaranteeing to them at least a repayment of the purchase price and interest, in case the title to the property and lien of the tax thereon fail from any cause; and so well has the law operated that taxes as a rule everywhere in the state are promptly paid, the delinquent list being of but small proportions, while no person has been robbed of valuable property for a trifle.

Jeffrey v. Fleming.

But no county will be permitted to retain money collected as in the case at bar, to which it has no lawful or equitable right.

The judgment of the district court is reversed so far as the taxes paid by the plaintiff and her grantors to protect their supposed title and lien are concerned; and judgment will be entered in this court for the amount paid prior to September 1, 1879, with twelve per cent interest thereon to that date, and ten per cent since that time; and for the amounts paid as above since September 1, 1879, with ten per cent per annum.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

28	685
41	18

HENRY JEFFREY, PLAINTIFF IN ERROR, V. HORTENSE
FLEMING, DEFENDANT IN ERROR.

[FILED JUNE 13, 1889.]

Husband and Wife. In an action against a wife to recover for meat used in keeping a restaurant, the testimony showed that the restaurant had been purchased by the husband and carried on in his name, and that the account was charged in the surname of the husband and wife. *Held*, That a verdict in effect that the wife was not liable for the debt, was supported by the clear weight of evidence.

ERROR to the district court for York county. Tried below before NORVAL, J.

France & Harlan, for plaintiff in error.

Sedgwick & Power, for defendant in error.

MAXWELL, J.

This action was brought against Phillip Fleming and Hortense Fleming, husband and wife, on an account for meat sold and delivered between the 25th of April, 1886, and April 23d, 1887. The amount of the bill is \$71.53, which is admitted to be correct. On the trial of the cause the jury returned a verdict in favor of the wife, and a motion for a new trial having been overruled, judgment was entered on the verdict. The principal ground of error relied upon in this court is that the verdict is against the weight of evidence. The testimony tends to show that in November, 1885, Phillip Fleming engaged in the business of keeping a restaurant in the city of York, and continued as proprietor of said restaurant during all the time the meat bill in question was being contracted. That he purchased this restaurant himself and gave two mortgages on the furniture therein, is undisputed. He also had an interest in a livery stable at that place, and the plaintiff testifies on cross-examination to the question:

Q. He [Phillip Fleming] came there with considerable property?

A. Yes, sir; said to have.

The credit, it appears, was given to "Fleming," the surname of the parties; but the credit evidently was given to the husband; and there is no testimony in the record that would justify a jury in finding that the meat in question was purchased by the wife on her own credit, or that the restaurant was conducted in whole or in part as her property. The verdict therefore is right, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

M. O. CALLENDER ET AL., PLAINTIFFS IN ERROR, V.
WILLIAM HORNER, DEFENDANT IN ERROR.

[FILED JUNE 13, 1889.]

Parent and Child. GIFT TO CHILD. A wife and mother made a gift of a valuable horse to her son, then about twenty-one years of age. This property was afterwards attached for the debts of the father. The son thereupon brought an action of replevin and recovered the possession of the horse, and on the trial the mother testified that she paid \$400 for the horse, "besides the debt he owed us," and that she "worked hard for it, [the price of the horse.] I sold potatoes and everything I could sell off the place;" which testimony was not explained and was undenied. *Held*, That a judgment in favor of the son was supported by the weight of evidence, and would not be set aside.

ERROR to the district court for Boone county. Tried below before TIFFANY, J.

Robertson & Campbell, and *C. L. Harris*, for plaintiffs in error.

James S. Armstrong, *Geo. W. Brown*, and *Harwood, Ames & Kelly*, for defendant in error.

MAXWELL, J.

The McCormick Harvesting Machine Co. brought an action by attachment against Robert Horner, and caused the writ to be placed in Callender's hands, who, as constable, levied said writ on "one dapple-gray stallion, (Norman,) six years old, weight sixteen hundred pounds." William Horner thereupon brought an action of replevin, and obtained possession of the property, and on the trial a jury was waived, the cause tried to the court, and judgment rendered in favor of Horner.

The testimony shows that the defendant in error is a son

of Robert Horner and Mary J. Horner, and that about the time of bringing this action he was twenty-two years of age. The testimony also shows that he received the horse as a present from his mother. The mother testifies that the son had been the owner of two colts which had been sold on the father's account. On cross-examination she testifies:

Q. These colts were sold on the Coan chattel mortgage, were they not?

A. Yes, sir; they were sold the same day, but not under the mortgage.

Q. Where did you get this stallion?

A. I got him of Mr. Rogen, after the chattel-mortgage sale.

Q. How long after the foreclosure of the Coan chattel mortgage did you buy him?

A. About two weeks.

Q. Had you got the personal property from Mr. Coan at this time?

A. No, sir.

Q. How much did you pay Rogen for the horse?

A. I cannot exactly tell; Rogen was owing us some. I guess I gave him about \$400 besides the debt he owed us.

Q. How long had he owed you folks this claim before you bought the horse?

A. Not a great length of time; I cannot exactly say.

Q. Would it be a year or more?

A. No, sir; it was only a short time.

Q. Where did you get the \$400 which you paid Mr. Rogen for the horse?

A. I worked hard for it. I sold potatoes, and everything that I could sell off the place.

This testimony is not denied, and it fails to show that the property of Robert Horner was used to pay for the horse. A jury might, perhaps, infer that such was the case for a part of the consideration; but the proof fails to

Callender v. Horner.

reach that degree of certainty that will justify a reviewing court in reversing the judgment on that ground. The horse in question was not liable, therefore, for the debts of Robert Horner, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

M. O. CALLENDER ET AL., PLAINTIFFS IN ERROR, V.
MARY J. HORNER, DEFENDANT IN ERROR.

[FILED JUNE 13, 1889.]

1. **Husband and Wife.** In an action by attachment against a husband, the wife brought an action of replevin and recovered possession of the goods and had judgment in the court below. It appeared that the parties had formerly lived in Iowa and were possessed of a valuable farm and considerable personal property; that there was a first mortgage on the farm of from \$8,000 to \$9,000, also a second mortgage for more than \$2,000, and chattel mortgages to the latter party on the personal property. The land was sold under the first mortgage and redeemed by the second mortgagee, who thereupon foreclosed his chattel mortgages and purchased the property, and after satisfying his own claim, delivered the surplus to the wife. *Held*, No fraud being charged or proved in the premises, that the wife took a good title as against the creditors of the husband.
2. ———. The fact that the husband lists his wife's property for assessment in his own name, or even pays the taxes thereon, is not conclusive that he is the owner of the property.

ERROR to the district court for Boone county. Tried below before TIFFANY, J.

Robertson & Campbell, and *C. L. Harris*, for plaintiffs in error.

James S. Armstrong, Geo. W. Brown, and Harwood, Ames & Kelly, for defendant in error.

MAXWELL, J.

This is an action of replevin brought by the defendant in error against the plaintiffs in error to recover possession of certain personal property levied upon as the property of Robert Horner, under a writ of attachment by Callender as constable, in an action wherein the McCormick Harvesting Machine Company was plaintiff, and Robert Horner defendant. On the trial of the cause, a jury was waived and the cause tried to the court, which found the right of property and right of possession in the defendant in error, and rendered judgment accordingly. The testimony shows that the defendant in error is the wife of Robert Horner; that the note on which the attachment proceedings are based is for the sum of \$195, due in one year from date, and is dated October 1, 1884. The testimony also shows that Robert Horner formerly resided in Clinton county, Iowa, where he was the owner of 280 acres of land; that there was a mortgage on this land to one Briggs for a very large amount; that Horner was also indebted to one Coan for a sum in excess of \$2,000; that part of this sum was secured by a neighbor of Horner as indorser, but whether this neighbor was possessed of property or not does not appear, nor is it material; that Horner and wife, to secure the amount due Coan, executed a second mortgage on the land to him, and also a chattel mortgage on all their personal property; that in the year 1882 Briggs foreclosed his mortgage on the land, the amount due thereon being between \$8,000 and \$9,000, and the land was sold under the foreclosure; that before the expiration of the year in which parties interested might redeem, Coan redeemed the land from the Briggs foreclosure; that he thereupon foreclosed his chattel mortgages, and all the personal property mortgaged seems to have

been sold under this foreclosure; but the testimony on this point is not very clear. Coan, however, after satisfying his own claim in full, turned over the remainder of the property to the wife, (defendant in error.) On this point she testifies on cross-examination: "I got it [the property in question] from W. F. Coan."

Q. State where Coan got it, if you know.

A. When our place ran behind, and was in debt, Mr. Coan told me he would save me a divide of the property. Mr. Coan took a mortgage on the property and got it.

Q. How did you get the property from Coan?

A. Well, his sons came out and were there on the day of sale, and allowed me so much for my share.

Q. What, if anything, did you pay Coan for this property?

A. That was my divide of my husband's property.

Q. Did you pay any money to Mr. Coan for this property?

A. No, sir.

Q. Did you give him any other consideration for it?

A. Yes, sir; he had a hold of our property.

Q. What property was the mortgage you speak of to Mr. Coan?

A. On land, horses, and cows, and machinery; everything only house furniture.

Q. Was this property all covered by one mortgage?

A. Yes, sir; all but six head of horses.

Q. Did you sign all of these mortgages?

A. Yes, sir.

Q. When you speak of your divide in the property, Mrs. Horner, what do you mean? State fully.

A. Share of my husband's property.

Q. Then prior to Coan's foreclosure your husband owned this property, did he not?

A. Yes, sir.

Redirect:

Q. All of this property was mortgaged to Mr. Coan?

A. Yes, sir.

Q. The mortgage was foreclosed by Mr. Coan, was it not?

A. Yes, sir.

Q. The property was sold and bought in by Mr. Coan, was it not?

A. Yes, sir.

Q. After the property mentioned in this complaint was sold on chattel mortgage and purchased by Mr. Coan, what became of it?

A. He gave me it for my divide.

The examination fails to make clear what was meant by the "divide" she speaks of. We are left to infer, however, that the land mortgaged was the homestead, and that by surrendering that she was promised the surplus after paying the mortgage debts; or perhaps Mr. Coan may have turned over the surplus to her as the equitable owner after paying his claim. Mr. Coan's testimony was not taken. No fraud is charged against him or against the defendant in error, in that transaction, and we cannot infer it. The presumption is that she obtained the property honestly, and there must be some proof offered to overcome this presumption to authorize a court to declare the transaction fraudulent. So far as the testimony shows, the property had been transferred to Coan to pay the debts of the husband, and the return of a part of the property to the wife was either in consideration of the surrender of some right, as that of homestead, or from a sense of justice on the part of Coan. In addition to this, most of these transactions seem to have taken place before the debt to McCormick had been incurred.

One of the principal points relied upon by the plaintiffs in error, is the fact that for a year or two before the bringing of the attachment suit, Robert Horner had listed the prop-

 Jones v. Bates.

erty to the assessor in his own name. This, however, is a mere circumstance, and by no means shows that he is the owner of the property. The husband may have been, and probably was, in the habit of transacting business for his wife, and paying the taxes on her property, and instead of listing the property in her name, had caused the same to be listed in his own. This, taken in connection with other facts, might be sufficient to show that he was the owner; but standing alone it is not.

Upon the whole case it is apparent that the judgment is sustained by the clear weight of evidence, and it is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

E. H. JONES ET AL., PLAINTIFFS IN ERROR, V. LUCY A.
BATES ET AL., DEFENDANTS IN ERROR.

[FILED JUNE 13, 1889.]

1. **Liquors: SALE TO HUSBAND: PARTIES.** A married woman and her minor children constituting one family, may join in an action for the loss of means of support caused by the intoxication of the husband and father, against those who furnished him intoxicating liquor.
2. ———: **ACTION AGAINST LIQUOR SELLER.** Such action may be brought against the persons furnishing such liquor personally and not on their bonds. The cause of action arises from injury occasioned by furnishing the liquor. The bond is given as an indemnity for the payment of such damages; but the plaintiff, if he see fit, may sue the saloon keeper alone, and not his sureties.
3. ———: ———: **PARTIES.** All persons who furnished intoxicating liquors which contributed to the intoxication, may be joined as defendants.

26	668
35	291
26	683
40	731
26	693
44	444
26	698
53	669

4. ———: EFFECT OF LICENSE. A license to sell intoxicating liquors protects the licensee only against prosecutions by the state. It is no protection in an action for injuries inflicted on A, by B, by reason of intoxicating liquors furnished to B which contributed to his intoxication.
5. Instructions examined, and *held*, properly given.
6. Instructions asked by defendants, *held*, properly refused.

ERROR to the district court for Dixon county. Tried below before POWERS, J.

W. E. Gantt, for plaintiffs in error, cited: *Dillon v. Linder*, 36 Wis. 344; *Davis v. Justice*, 31 O. St. 363; *Barnet v. National Bank*, 8 Otto, 559; Potter's Dwarrior on Statutes, pp. 162, 228, 229, 275.

Barnes Brothers, for defendants in error, cited: *Ashton v. Jones*, 14 Neb. 428.

MAXWELL, J.

The defendants in error brought an action in the district court of Dixon county against the plaintiffs in error, who are saloon keepers, to recover for loss of means of support caused by intoxicating liquors furnished by the plaintiffs in error to the husband of Lucy A. Bates, and father of the defendants in error, who are minors. On the trial of the cause the jury returned a verdict for \$600 in favor of the defendants in error, and a motion for a new trial having been overruled, judgment was entered on the verdict.

A large number of errors are assigned. The first relates to the petition, which it is claimed is insufficient. Omitting the formal parts, it is as follows: "That from the 30th day of April, 1883, to the time of filing this petition, that the said defendants Elijah H. Jones and William Gillen were engaged in business in the retail traffic in intoxicating liquors, in the village of Ponca, county of Dixon, and state of Nebraska, as partners under the firm name and

style of Jones & Gillen; that said defendants Peter Smith and B. W. Doyle, from the 30th day of April, 1883, up to the 1st day of May, 1885, were engaged in business in the retail traffic in intoxicating liquors, in the village of Ponca, county of Dixon, state of Nebraska, as partners under the firm name and style of Doyle & Smith; that said defendants Patrick E. Rush and J. N. Hamn, from the 30th day of April, 1883, up to the time of filing this petition, were engaged in business in the retail traffic of intoxicating liquors, in the village of Ponca, county of Dixon, and state of Nebraska, as partners under the firm name and style of Rush & Hamn; that at and during all of the time aforesaid, the said Lucy A. Bates, plaintiff, was for a long time prior thereto, and now is, the wife of one C. W. Bates, and is residing in a state of wedlock, in Ponca, Dixon county, Nebraska; that during all of the time hereinbefore mentioned, the said C. W. Bates, the husband of this plaintiff, was addicted to the immoderate use of intoxicating liquors as a beverage; and that said defendants during all of said time, did sell, give, and furnish, intoxicating liquors to said C. W. Bates, to such an extent and in such quantities that the said C. W. Bates became and was, during all of said time, a habitual drunkard, and was continually in a state of intoxication, and was thereby rendered wholly unfit to perform labor, and was unable to carry on his business, and did not furnish this plaintiff with any means of support; that her said husband, C. W. Bates, during all of said time, was in such a condition by reason of the use of said intoxicating liquors, so sold, given, and furnished, to him by defendants, that his earnings were small, and what money he did earn was all paid to defendants for said liquor as aforesaid; and that all of said defendants sold, gave, and furnished, said liquor to C. W. Bates which so caused his intoxication as aforesaid; and that he, the said C. W. Bates, spent much of his time in the saloons so kept by defendants; and that the said defendants did continue to sell

and did sell said intoxicating liquors to said C. W. Bates while he was intoxicated as aforesaid; that the said C. W. Bates, while so intoxicated, was profane, cruel, and abusive, to this plaintiff and said minor children; that he was unable to support himself, and plaintiff was obliged to labor to support her said husband as well as herself and minor children; that this plaintiff and her said minor children were during all of said time dependent on her said husband, C. W. Bates, for their means of support; that said C. W. Bates is a mechanic, millwright, and a blacksmith, by profession, and well skilled in all kinds of mechanical work; that when sober and not under the influence of intoxicating liquor, he was an industrious man, and well able to earn, and did earn, for the support of this plaintiff and her minor children, the sum of from three to five dollars per day, or the sum of \$1,000 per year; and that during all of the said time, and for the three years last past, said C. W. Bates has been unable to labor and to obtain employment by reason of his so being continually in a state of intoxication, caused by the selling, furnishing, and giving, of said intoxicating liquors to him by said defendants as hereinbefore set forth, and has not contributed anything to the support of the said plaintiff and her said minor children; and that plaintiff has been left entirely destitute, and has during all of said time been obliged to and has gone out to menial service and labor in order to earn the means necessary to support and clothe herself and her minor children; and that said C. W. Bates has himself been so supported by this plaintiff; that plaintiff and her said minor children constitute one family and reside in Ponca, Dixon county, Nebraska, and have been and are entirely without the means of support as aforesaid, and that plaintiffs have sustained damages to their means of support in the premises, in the sum of three thousand dollars."

The defendants below (plaintiffs in error) demurred to the petition upon three grounds, viz.: a defect of parties

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defendant, improper joinder of causes of action, and that the facts stated in the petition do not constitute a cause of action. The demurrer was overruled, to which exceptions were duly taken, and they filed answers in which they in substance pleaded, first, a general denial; second, that they were not jointly engaged in the business of selling intoxicating drinks, and did not jointly furnish C. W. Bates intoxicating liquors; third, that they have given bond and received license for the sale of intoxicating liquors, and that they are liable only on their respective bonds.

No reply was filed to this answer.

The objection raised to the petition is, that the action is one arising alone by virtue of the statute, and that as the statute makes the saloon keepers liable on their bonds, they are not liable in any other manner. The question here presented was before the court in *Roose v. Perkins*, 9 Neb. 304, the action in that case being against the saloon keepers personally, and not on their respective bonds. The cause of action is not the bond. The bond is merely a mode of securing satisfaction for the injury. In other words, the bond is given as a means of indemnifying persons who may be injured by the saloon keeper furnishing intoxicating liquors to another. The cause of action, however, arises from an injury suffered in consequence of the furnishing of such liquors. The license is in the nature of a regulation, but is no protection to the person furnishing the liquor, except as against the state. Notwithstanding the license, the person licensed furnishes liquor at his peril, and if he contributes to the intoxication of an individual by reason of which an injury results to any one, he will be liable. The act of furnishing the liquor is regarded in law as a tort, and all who furnish it as wrong-doers. The demurrer, therefore, was properly overruled, and the second and third counts of the answer, for the reasons above stated, constitute no defense.

The testimony tends to show that C. W. Bates, the hus-

band, before he became addicted to the habitual use of intoxicating liquors, was a skillful mechanic, a kind husband, and considerate father, and was earning from three to five dollars per day; that during the time stated in the petition, he procured intoxicating liquors from the three saloons of the plaintiffs in error, and that during that time he almost wholly failed to provide for his wife and family; that his wife, by washing, ironing, and other labor, had been compelled to provide for her own wants, and for her children. The testimony also shows that Bates was naturally industrious; as expressed by one of the witnesses, "there was not a lazy hair in his head." The cause of the loss of means of support is clearly shown to have been the intoxication of Bates.

On the part of the plaintiffs in error, it is attempted to be shown that Bates had, prior to the date fixed in the petition, become so addicted to the use of intoxicating liquors as to be incapable of earning a support for his wife and family. This cannot be considered even in mitigation of damages. It will not do for the parties to say, "That man was a partial wreck when we commenced to sell him intoxicating liquor, and he so continued while we supplied him the means to be such." Had they ceased supplying him with intoxicating drink, it is probable that he would soon have regained his usual vigor; and having failed to do so, and thereby kept him incapacitated for earning a livelihood, they must answer for the value of his labor, as if he had been able to perform it.

Some objection is made to the proof of marriage; but we find that the plaintiffs in error in examining Bates, whom they called as a witness, proved by him that he was the husband of Lucy A. Bates. It is unnecessary, therefore, further to consider that question.

The court, on its own motion, instructed the jury as follows:

"1st. This action is brought to recover from defendants

for damages to the means of support of the plaintiff and the support of her minor children, by reason of the defendants selling to her husband, C. W. Bates, intoxicating liquors during the period from April 30th, 1883, to September 9th, 1885, in the town of Ponca, Nebraska.

"2d. By the law of this state, every person who sells or gives intoxicating liquors to another, and thereby in whole or in part causes the intoxication of such person, is liable to the wife of the person so becoming intoxicated, for any injury she may sustain to her means of support, resulting as a consequence of such intoxication.

"3d. In order to entitle the plaintiff to recover, she must prove by a preponderance of evidence that the plaintiff at the time stated in her petition, was the wife, and that Ora Bates, Manley Bates, Merritt Bates, and Robert Bates, were the minor children of C. W. Bates, and constituted one family; and that said defendants, or either of them, or the servants or employes, or any person acting for said defendants, or either of them, did during the period from April 30, 1883, to September 9, 1885, sell or give to said C. W. Bates, intoxicating liquors of any kind, and thereby in whole or part cause the intoxication of said Bates, and in consequence of such intoxication, or the use of such liquors, the plaintiff was thereby damaged in the means of support to herself and the minor children mentioned. And unless you do so find, your verdict should be for the defendants.

"4th. In an action of this kind, the person injured may sue any one or all of the persons who may have furnished the intoxicating liquors which caused, by their joint acts and sales, the damages, if any, resulting from such sales, and may recover, if the testimony warrants it, from any one or more of the persons who by themselves, their agents, or employes, made such sales or furnished such intoxicating liquors, the damages sustained thereby.

"And in this case, although against all of the defendants

jointly, you have the right, if you find that the evidence warrants it, to return a verdict against all or either of them; that is, against the defendants Jones & Gillen, the defendants Rush & Hamn, or defendants Smith & Doyle, or may return a verdict in favor of all or either of them.

"5th. In determining the amount of damages, if any, you find the plaintiff entitled to, you are at liberty to consider the habits, health, and estate, of the husband of plaintiff up to and before the 30th day of April, 1883, and the profits of his labor, if any, and the condition of his said family at such time as elements in deciding what the amount of the injury or damages may have been from the loss of such support, if any, during the period mentioned from April 30, 1883, to September 9, 1885; but in no case of this kind can the amount of damages exceed the value of such support, whatever may be the necessity of such family.

"6th. In order to make defendants or either of them liable for injuries to loss of support occasioned by intoxication, which resulted from drinking intoxicating liquors furnished to the husband of plaintiff, it is not necessary that such intoxication be wholly produced by intoxicating liquors furnished by defendants. It is only necessary to show that the liquors furnished by them, if any, contributed or assisted in producing such intoxication, which resulted in the loss of such support.

"7th. This is a civil action, and in such cases the plaintiff must prove the material facts as alleged in the petition by a preponderance of evidence; and until this is done the plaintiff is not entitled to recover.

"8th. If you find for the plaintiff, you will assess her damages in such sum as the evidence has shown her entitled to, not exceeding the amount claimed in the petition.

"If you find for the defendants, you will so state in your verdict."

These instructions contain a clear and concise statement of the law, and there was no error in giving them.

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The plaintiffs in error asked the court to give the following instructions, which the court refused to give:

"No. I. The jury are instructed that the burden of proof is on the plaintiffs, and to entitle them to recover in this action, they must show by a preponderance of the testimony every material allegation of their petition; and if in your judgment the proof introduced by plaintiff fails to show this, then your verdict shall be for the defendants.

"No. II. The jury are instructed that the plaintiffs must prove affirmatively that the defendants sold liquor to C. W. Bates, as set out in the petition, and that the liquors so sold to C. W. Bates were intoxicating."

It will be observed that the court had already given the first instruction asked, while the second is entirely too narrow in limiting the right to recover to liquor sold to Bates, and also in other respects. It was properly refused, therefore.

There is no material error in the record. It is apparent that the verdict should have been for a much larger sum; but that is not a matter for us to consider. The judgment is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

28 701¹
31 370

THE STATE OF NEBRASKA, EX REL. LINCOLN LAND CO.,
V. H. C. EDWARDS ET AL.

[FILED JUNE 13, 1889.]

1 **Taxes: EQUALIZATION.** The county board of equalization has power under the third subdivision of section 70, chapter 77, Compiled Statutes, to increase or diminish the aggregate valuation of any precinct or township by adding or deducting such sum as may be necessary to produce a just relation between the

valuations of the several precincts or townships of the county; but it cannot increase the aggregate valuation of all the precincts or townships except in such an amount as may be actually necessary and incidental to a proper and just equalization.

2. ———. A complaint is necessary, first, where the complainant is aggrieved by his own assessment; and second, where he is aggrieved by the low assessment of another. Notice must be given the party to be affected; but in equalizing the valuations between the different precincts or townships of a county, no complaint or notice is required. The rule as stated in *South Platte Land Co. v. Buffalo Co.*, 7 Neb. 253, and *Dundy v. Richardson Co.*, 8 Id. 508, has been changed by statute.

ORIGINAL application for mandamus.

Marquett, Deweese & Hall, for relator.

O. P. Mason, and *S. B. Brierly*, for respondent.

MAXWELL, J.

The county commissioners of Perkins county, as a board of equalization of that county, made certain changes raising the assessment in several of the townships of that county, and a writ is prayed to compel them to strike such increase from the records. The case is submitted to the court on the petition and answer. There is but little dispute as to the facts, and they are stated in the answer as follows:

“And your respondents further represent that on said 16th day of June, 1888, among other business transacted by said respondents, while sitting and acting as a board of equalization, and in the discharge of their duties as such board of equalization, the following proceedings were had and done, and the same were duly recorded by the clerk of said board, which proceedings were as follows:

“June 16th, 1888.

“Objections having been filed by the Lincoln Land Company’s attorney to the assessment of Venango town-

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site lots, after considering the objections and taking counsel from the county attorney, the following motion was introduced: Moved and carried to deduct 20 per cent from the assessed valuation of Venango real estate. Carried. The board then proceeded to the equalization of the following property of the following towns, as follows:

“Venango, deduct 20 per cent; Lisbon, add 25 per cent; Grant, add 80 per cent; Madrid, deduct 10 per cent; Elsie, add 10 per cent, to the assessed valuation.

“Moved and seconded to adjourn to meet Friday, June 22d, 1888.

H. C. EDWARDS, *County Clerk*,

“By D. E. GRAY, *Deputy*.”

“And your respondents further show to the court that twenty per cent from the assessed valuation of relator’s real estate in Venango was deducted upon the application of said relator; that all the other deductions and additions made, were made as a part of the process of equalization of the assessed valuation of the property in the various towns of said county.

“And your auditors further submit to the court under the advice of counsel, that the said proceedings were in all things regular, and in accordance with the statute—section 70, Equalization of Assessments, chapter 77, pages 596 and 597, Compiled Statutes, Nebraska. And under the said statutes it is made the duty of said board of equalization to ascertain whether the valuation of one township, precinct, or district, bears just relations to the townships, precincts, or districts, in the county; and they are authorized to increase, diminish, or aggregate, the valuations of property in any township, precinct, or district, by adding or deducting such sum upon the hundred as may be necessary to produce a just relation between all the valuations of the property in the county; that this was done after said relator’s property had been reduced 20 per cent from said valuation returned by the assessor.

"And your respondents, in further answering, say that the said relator was present by their counsel, C. P. Logan, during the whole of said proceedings, both at the time when 20 per cent was deducted from the valuation of the relator's property, and during the time when and all of said time that said board was in session, and proceeded to equalize the assessments in the various towns in said county, in the manner herein set forth, and that the said relator, neither at said time nor any time subsequent to the time thereto, appealed from said order of said commissioners, or made any objections to said equalization. And your respondents, in further answering, show that the assessed valuation of the real estate of the towns of Grant, Madrid, Venango, Lisbon, and Elsie, as returned by the assessors, was as follows: Grant, \$15,906; Madrid, \$8,109; Venango, \$22,842; Lisbon, \$1,596; Elsie, \$3,097; total, \$51,550. The following, as shown and as determined by the board of equalization of the several precincts above named, was as follows: Venango, \$10,335; Lisbon, \$1,986.50; Elsie, \$3,457.30; Grant, \$28,430; Madrid, \$7,297.60; total, \$51,488.40, showing the total value as determined by the board of equalization was less than the total value returned by the assessors of the said several precincts; that the valuation, changes, and additions, were made to equalize the several assessments as returned by the board of equalization."

An exhibit of the valuation of the real estate of the towns of Grant, Madrid, Venango, Lisbon, and Elsie, as returned by the assessors was attached to the petition. Also an exhibit showing the valuation of these same towns as determined by the board of equalization. The exhibits referred to show that the allegations of the answer are true. The case therefore falls directly within the rule laid down in *Suydam v. Merrick Co.*, 19 Neb. 155, that a county board of equalization has the power to increase or diminish the aggregate valuation of any precinct by adding

or deducting such sum upon the hundred as may be necessary to produce a just relation between the valuations of several precincts in the county, the increase in valuation not to exceed the aggregate valuation of all the precincts as they were returned by the assessors; except in such an amount as may be actually necessary and incidental to a proper and just equalization. This power is granted by the third subdivision of section 70, chapter 77, Compiled Statutes. In equalizing the assessments of the several precincts or townships of a county, no complaint of inequality is necessary, nor need notice of such intended action be given. (*Suydam v. Merrick Co.*, 19 Neb. 155.) The statute in that regard has been changed since the case of *South Platte Land Co. v. Buffalo Co.*, 7 Neb. 253, and *Dundy v. Richardson Co.*, 8 Neb. 508, were decided. (See *Suydam v. Merrick Co.*, 19 Neb. 159.)

The relator contends that the board has no authority to act until a complaint is filed setting forth the grievance complained of. There are two classes of cases in which to authorize the action of the board: a complaint must be filed, first, where the complainant is aggrieved by his own assessment; and second, where he is aggrieved by the low assessment of another. (*State v. Dodge Co.*, 20 Neb. 600.) The reason for requiring a complaint in such cases, and notice to the party to be affected, is obvious. The assessor has performed his duty under oath, and the tax payer is supposed to have listed his property under the like obligation; and the valuation of the property of all persons is supposed to be based on the same rules. Objections to the assessment of any particular individual or individuals, therefore, may be the failure to list all the property that is in the party's possession, or to the valuation placed thereon by the assessor. It thus may be an attack upon the owner of the property, or of the assessor, or of both, and it is necessary that the examination be open and testimony taken in the case, and that all parties have a fair

hearing. As between the assessors of the different precincts or townships, however, there may be great inequalities in the assessment. Thus, the assessor of one precinct may value land at fifteen dollars per acre, while the assessor of another precinct may value land of the same kind at but five dollars per acre, and both assessors be honest in the performance of their duties. It thus becomes necessary to clothe the county board of equalization with power to equalize the valuations between the different precincts or townships of a county; and in such case the statute has made no provision for a complaint or notice. The board therefore had authority to act in the premises, and its judgment cannot be attacked by mandamus.

The writ is therefore denied.

WRIT DENIED.

THE other Judges concur.

LYMAN H. TOWER, PLAINTIFF IN ERROR, v. DAVID FETZ, DEFENDANT IN ERROR.

[FILED JUNE 13, 1889.]

1. **Conveyance: DEED SHOWN TO BE MORTGAGE.** F., the owner of a farm in Webster county, negotiated a loan of money thereon from one Fay, of New York, through T., a loan and investment agent at Hastings. The mortgage upon the farm was executed to Fay, but delivered to T., who attended to the collection of the interest, and, from the character of his dealings with Fay, was the moral guarantor of the interest and principal. F. made default in the payment of interest. T. being absent, wrote to one D., his local and general agent, that he would assume the mortgage in consideration of a warranty deed of the farm. Thereupon D. applied to F., and informed him that he was sent by T. to demand the interest, and that unless some arrangement was made, the mortgage would be foreclosed; that if F. would make them

26	706
38	45
23	706
41	876
36	706
44	147
36	706
46	829
26	706
48	244
48	706

a deed of the farm, they would take the land and sell it, and whatever was over after paying the mortgage, taxes, and expenses, they would return to him; and that F. might have the same privilege, in which case he could turn over the proceeds sufficient to pay the mortgage. Thereupon F. executed a warranty deed of the farm to T., and delivered it to D. This deed, as between F., and T., *held*, to be a mortgage.

2. ———: ———. A deed, absolute in its terms, may be shown by paroll to have been given for the purpose of securing the payment of money; in which case, as between the parties, such deed will be construed to be a mortgage only.

ERROR to the district court for Douglas county. Tried below before HOPEWELL, J.

Savage, Morris & Davis, for plaintiff in error, cited: *Hansen v. Berthelsen*, 19 Neb. 434; *Maigley v. Hauer*, 7 Johns. 341; *Craighead et al. v. Peterson*, 72 N.Y. 279; *Wood v. Goodrich et al.*, 6 Cush. 117; *Stainer v. Tysen*, 3 Hill, 279; *Owings v. Hull*, 9 Pet. 628; *Cruzan v. Smith*, 41 Ind. 228; *Tidrick et al. v. Rice*, 13 Iowa, 214.

Montgomery & Jeffrey, for defendant in error, 'cited; *Miles v. Ogden*, 12 N.W. Rep. 81, 82; *Wellauer v. Fellows*, 48 Wis. 105; *Ellwell v. Chamberlain*, 31 N. Y. 619; *Schadt v. Bessinger*, 3 Neb. 145; 1 Jones on Mortgages, sec. 324; *M' Crea v. Purmort*, 16 Wend. 460; 2 Devlin on Deeds, sec. 1118, and cases cited; *Villa v. Rodriguez*, 12 Wallace, 339.

COBB, J.

This action was commenced in the district court of Douglas county by David Fetz, plaintiff, against Lyman H. Tower, defendant.

The petition alleges that in March, 1880, the plaintiff was a resident of Webster county, and was owner in fee of one quarter section of land therein described, and that the defendant was a resident of the city of Hastings, engaged

in negotiating loans on farm property; that at said time plaintiff employed defendant to negotiate a loan on said land for the sum of \$800, with one Edwin R. Fay, for which plaintiff executed a mortgage on said land securing a note payable to said Fay, — years after date, with interest at ten per cent, semi-annually; that plaintiff was unable to meet the interest coming due on said note, and on the 28th of June, 1882, he was visited by one Dent, who was agent of said defendant, and who, by authority of defendant, approached plaintiff and informed him that if he did not pay the interest on said mortgage to Fay, the mortgage would be foreclosed and the property sold for a sum less than the amount of his indebtedness, and that a deficiency judgment would be rendered against him; but that if he would convey the land to the defendant Tower, he, Tower, would negotiate and sell the same at private sale for a much better price than it would bring at a judicial sale, and out of the proceeds would pay the said mortgage to Fay, and the taxes on the property, and account to the plaintiff for the balance of the price he should receive for the land. Accordingly, having confidence in the representations and promises of Dent, plaintiff made and delivered to Tower his warranty deed for the land, conveying the same to him, which deed was accepted by Tower on the day last mentioned, for which the plaintiff received no other consideration than the promises hereinbefore stated; that on January 2, 1883, Tower paid the taxes for the year 1881 on the land, amounting to \$18.70, and on July 10, 1883, paid the taxes for 1882, amounting to \$12.48; that defendant never paid any other sum on said land, but on June 27, 1883, sold the same for \$1,200 over and above the mortgage, subject to the payment thereof, to one Wallace L. Lighthart, and executed a deed therefor and received the said sum of \$1,200; that the defendant, though often requested by the plaintiff to account for and pay to him the consideration received from said Lighthart for said land,

less the amount of taxes paid thereon, has neglected and refused and still neglects and refuses so to do; with prayer for judgment for \$1,168.82, with interest from June 27, 1883, at seven per cent per annum.

The defendant answers, denying each and every allegation except such as are specifically admitted or denied; and admits that the plaintiff was the owner of the land; that he negotiated a loan for the plaintiff with Fay as alleged; that not knowing whether or not one Dent made the representations set forth, denies the same, and denies that Dent was the agent authorized and empowered to make any such representations, and says that he purchased the land from plaintiff, paying therefor a valuable consideration, and, in addition thereto, assumed the mortgage and note mentioned; that the land at the time of the purchase was not worth more than the amount loaned thereon, \$800, and in assuming the same defendant was paying the full value, and that the sale was made to him without any conditions whatever, and was a *bona fide* sale, and so understood by all parties concerned. He admits that he afterwards paid the taxes, and that on June 27, 1883, he sold the land to Wallace L. Lighthart and conveyed the same for \$1,200; and that he refuses to account to plaintiff for said sum, less the taxes, or for any other sum, and denies that he is indebted to the plaintiff in \$1,168.82, or any other sum whatever.

The plaintiff replied, denying that the defendant purchased said land, paying a valuable consideration, and denying that he paid any consideration whatever; denying that the land, at the time of the purchase, was not worth more than the amount loaned thereon, \$800; alleging that the land was worth at that time \$2,500; and denying that in assuming said note and mortgage defendant was paying its full value; and denying that the sale was made without conditions and was a *bona fide* sale, and so understood by all parties.

There was a trial to the court, a jury being waived, with a finding for the plaintiff and judgment for \$1,567.50.

The defendant brings the cause to this court on error, and assigns twenty distinct errors in the proceedings below, seventeen of which are for the alleged erroneous admissions of testimony offered by the plaintiff and objected to by defendant; the eighteenth, that the decision is not sustained by sufficient evidence; the nineteenth, that the decision is contrary to law; the twentieth, that the court erred in overruling the motion for a new trial.

The last three only, will be considered, as it has been often held that where a cause is tried to a court without the intervention of a jury, its judgment will not be reversed by an appellate court for error in the admission of testimony on the trial. (*Richardson v. Doty*, 25 Neb. 420; *Enyeart v. Davis*, 17 Neb. 228; 1 Greenleaf on Evidence, 14th Ed., sec. 49.) So that if upon the examination of the last three points it shall appear that sufficient material and competent evidence was before the court to sustain its findings and judgment, they will not be reversed for the reason that there was also before it illegal and incompetent testimony.

It appears from the bill of exceptions that in 1880 the plaintiff was the owner of a farm in Webster county, and the defendant was carrying on a loan agency and a business at Hastings. The plaintiff applied to the defendant for a loan of money on his said farm. Defendant entertained the application and sent one Dent, his brother-in-law and general agent on the outside business of his loan branch and agency, to inspect and value the farm. This, being done, resulted in the negotiation of a loan of \$800 by the plaintiff through the agency of the defendant from one Edwin R. Fay, of New York, an old customer of the defendant, a mortgage being executed upon the farm to secure the loan to Fay for said \$800, drawing ten per cent interest, payable semi-annually, for five years from March, 1880, the

period the mortgage was to run ; and that the plaintiff, through his son, paid one year's interest on the loan. At the expiration of the second year, that year's interest was unpaid, and defendant notified plaintiff by letter, as he testifies, to the effect that unless the interest was paid, the mortgage would be foreclosed ; that some time afterwards, defendant being absent in the east, wrote to Mr. Dent, his general agent, that he would assume the mortgage of plaintiff to Fay "in consideration of the warranty deed to me." About this time, and presumably after the receipt of the letter from Dent by the defendant, as appears by the testimony of the plaintiff, Dent applied to the plaintiff, representing that he was sent by the defendant to demand the interest due on the mortgage. The plaintiff being unable to pay the interest, Dent informed him that "they would have to foreclose the mortgage if he did not make some arrangement ;" that plaintiff replied to him that "he did not know what arrangement he could make, as he had no means at hand, at all, except the farm ;" that Dent then said that "they had a good deal of land on their hands, and were not very particular about taking any more ; but if plaintiff would agree to make them over a deed, they would take the land and sell it, and whatever was over after paying the mortgage and the actual expenses, they would pay to him, and that plaintiff might also have the same privilege, provided he would make the deed," to sell the land, and to notify them that he had sold it, and turn the money over to them ; that all that was done ; and that was the understanding ; that Dent said if the plaintiff did not do that, the mortgage would be foreclosed, and plaintiff would be burdened with another debt "on his relations, and that he had better do it ;" that Dent agreed at the time to give plaintiff papers to show this arrangement ; that the deed was then written out by Dent ; was left at the county clerk's office, and was afterwards executed by plaintiff and his wife and was placed on record. This deed was a general war-

ranty deed of the mortgaged farm of plaintiff to defendant, expressing the consideration of \$925, executed on June 28, 1882. There does not appear to have been any defeasance executed to the plaintiff by the defendant, nor any one for him, in accordance with the understanding between Dent and the plaintiff, as testified to by the latter.

The above facts, excepting those pertaining to the loan, the execution of the mortgage, the paying of one year's interest by the plaintiff's son, the delinquency of the second year's interest, the notifying of the plaintiff by the defendant that unless the same was paid the mortgage would be foreclosed, the writing by defendant to Dent from the east that he would assume the mortgage in consideration of a warranty deed of the farm, and the conveyance of the farm by plaintiff and wife to defendant, are denied in general by the defendant; but there is no evidence in respect thereto in conflict with that of the plaintiff. Just one year and a day after the execution of the deed by the plaintiff and wife to the defendant, the defendant and wife made their deed of the farm to William L. Lighthart for the expressed consideration of \$1,200, subject to the said mortgage and taxes.

It will be observed that the original mortgage was directly to Mr. Fay. The defendant testifies that although he did not guaranty mortgages taken by him directly to Fay, and while he did not think that he would be obliged to make good any deficiency in such loans, yet, in point of fact, he had always made good the loans, and had always felt that, without reference to any special guaranty, he should take care to make good any such loans; therefore, the defendant stood in the same attitude toward the plaintiff, in this transaction, as if the original mortgage had been made to him and he was the owner of it; and this being the case, according to the testimony of the plaintiff, which was accepted by the court, the absolute deed of the plaintiff was substituted for the mortgage, not for the purpose of con-

veying the equity of redemption, but of placing it in the power of the defendant to sell and convey the land and thereby raise the money to discharge the mortgage and taxes. According to the defendant's testimony, Dent was authorized to receive a conveyance of the land from the plaintiff; but notwithstanding that, he further testifies that Dent was not authorized to make the contract and offer the promises which the plaintiff testifies he made and offered to him.

I think that the deed, under the circumstances in evidence, must be held to be of that character, and to have been given for the purpose, expressed by whatever contract was made, and such understanding as was had, between the plaintiff and Dent at the time of its execution by the one and its acceptance by the other.

It is worthy of mention that neither the note, nor the mortgage executed by the plaintiff to Fay, was either canceled or delivered up to the plaintiff at the execution of the deed; nor does it appear to have been done to this day.

I do not conceive the question of estoppel to be a controlling consideration in this case, but rather that by means of this conveyance, the defendant, having the control of the mortgage, and acting through Dent, who was clearly his agent to receive the deed, and by the subsequent disposal of the land, received a large sum of money in excess of that sufficient to pay all claims which as agent for and moral guarantor to Fay, or Fay himself, he was entitled to receive, in his discharge of the mortgage. This money, it would appear to be inequitable and against good conscience to decree that the defendant should retain.

But the most important legal question presented, is whether the trust created by and resulting from the deed, absolute on its face, could be proved by parol testimony. There is sufficient authority on this question. The case of *Babcock v. Wyman*, 19 How. (U. S.) 289, was in all material features similar to the case at bar. One Nehemiah

Wyman, was seized in fee of real property in Charleston, Massachusetts, and mortgaged it to the plaintiff to secure certain debts, due him in his own right, and certain others due to the estate of Francis Wyman, deceased, of which the plaintiff was executor. Nehemiah not being able to pay the accruing interest to the plaintiff, and being urged by his brother William to make a deed in fee of the land to the plaintiff that he might manage and improve it, and apply the rents and profits to the interest and gradually liquidate the principal, and being promised by the plaintiff further advances, conveyed the property to the plaintiff it being expressly agreed that notwithstanding the form of the conveyance, it should stand as security only for the sums due from him, amounting to \$2,033.87. The plaintiff took possession of the property, and afterwards represented himself as the sole owner, and sold it at private sale, without notice to Nehemiah, for \$8,000. Nehemiah subsequently conveyed his right to redeem to Edward Wyman, a citizen of the state of Missouri, who exhibited a bill against the plaintiff in error in the circuit court of the United States for the district of Massachusetts. Decree was rendered, on evidence and argument, for the complainant, and the cause was brought to the supreme court of the United States for review. The principal question raised by the appellant was whether, under the circumstances of the case, it was competent to show by parol evidence that a deed, absolute in terms, was intended to operate only as a mortgage. The opinion was by Justice McLain, who, upon principle and the authority of that court, and other notable instances, held that it was competent to prove the trust thus established by parol testimony. The decree of the circuit court was affirmed.

Supplemental to this is the case of *Morgan's Assignee v. Shinn*, 15 Wallace, 105, in which the same question arose. The assignees of the plaintiff, in this case, to enforce a contribution for an advance made for the repairs and expenses

of the "Fairfax," a steamer, exhibited a bill averring that the defendant was the owner of one-fourth part of the vessel, and the defendant answered that he had a mere interest as a mortgagee. It appeared in the facts of the case that in October, 1865, one Kelly was the owner of one-fourth part of the vessel, and made a bill of sale of his interest to the defendant, and at his instance the bill of sale was forthwith recorded. On the 23d of October the vessel was reënrolled, by Morgan swearing that the defendant was the owner of one-fourth. Subsequently the vessel was destroyed by fire. In the trial court, there was the parol evidence of the defendant and that of the writer of the bill of sale, and others, that the bill of sale, though absolute in its terms, was intended only to secure the payment of money advanced by the defendant to Kelly to enable him to pay for his one-fourth part of the vessel. The case presented was that if the defendant was the real owner, under the terms of the bill of sale, he was liable to the plaintiffs for the one-fourth part of the advances for repairs and expenses of the vessel; but if the bill of sale was only a security, then he was not liable. The trial court dismissed the bill, and the plaintiffs brought it for review to the supreme court. The opinion of the supreme court, by Justice Strong, held that it is not questionable that an instrument, absolute in its terms, may be shown, by parol evidence, to be only a mortgage; the author of this opinion citing the case already referred to of *Babcock v. Wyman*, *supra*; *Foyer v. Lavington*, 1 Peere Williams, 268; *Russel v. Southard*, 12 Howard, 139. The judgment of the lower court was unanimously affirmed.

On these considerations and precedents, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

GEORGE T. DAWSON ET AL., PLAINTIFFS IN ERROR, V.
RALPH DAWSON, DEFENDANT IN ERROR.

[FILED JUNE 13, 1889.]

1. **Depositions.** To entitle a deposition to be read in evidence, the certificate must show that the deposition was taken at the place, room, or office, named in the notice, and the certificate or deposition on its face must show that the taking of the deposition was commenced on the day named in the notice.
2. ———. Where a motion to suppress a deposition has been erroneously overruled, in order to make such error available, the party against whom such ruling is made, must, when such deposition is offered in evidence, object thereto and save his exception.
3. **The Evidence examined, and held,** to sustain the judgment.

ERROR to the district court for Johnson county. Tried below before BROADY, J.

S. P. Davidson, for plaintiff in error.

A. M. Appelget, for defendant in error.

COBB, J.

This was an action in the nature of ejectment tried in the district court of Johnson county.

The plaintiff by his petition alleges that he has a legal estate in and is entitled to the immediate possession of the northwest quarter of the southwest quarter of section twenty-four, township five north, range nine east, and that ever since August 9, 1882, the defendants have been in possession of said land and still keep the plaintiff from the lawful possession thereof.

The defendants by their answer allege that at the commencement of this suit they were, and for more than six years had been, in the possession of their own barn or sta-

bles, and their own corrals, erected on not to exceed two acres of said land, and also of three rooms of the dwelling house thereon, and at the commencement of this suit, they, or either of them, were not in the possession of any portion of the balance of said land; that said stables, lots, and corrals, were placed on said portions of said land, and these defendants took possession of the portions of said dwelling house, under an agreement with Eleanor J. McFadden, (then E. J. Dawson,) who held the title to the land at the date of the agreement, that if defendants would place said improvements upon the land, and take good care of the premises, and also by reason of the land having been bought with the proceeds of property in which these defendants owned a large interest, she would deed the land to defendants, or to one of them, when they became of age; that the plaintiff knew of such agreement when he procured Eleanor J. McFadden to deed the land to him; that the defendants have kept and performed the agreement on their part; that both defendants were of age and upwards at the commencement of this suit, and were entitled to a conveyance of said real estate in pursuance of said agreement. The defendants deny that at the commencement of this suit they were in the possession of any other portion of the land mentioned, and deny every other allegation of the plaintiff not specifically admitted.

The plaintiff by his replication denied all new matter set up by the defendants; that they had been in possession in the manner set forth in their answer, or under any agreement of sale of Eleanor J. McFadden, or that of any other person.

There was a trial to the court, a jury being waived, with a finding and judgment for the plaintiff.

The defendants bring the cause to this court on error: "1. That the district court erred in overruling the motion to suppress the deposition of Eleanor J. McFadden."

Notice was served on the attorney for the plaintiffs in

error that the plaintiff below would take the deposition of the deponent, to be used in evidence on the trial, at the office of S. F. Lazier, James street, South Hamilton, Ontario, Canada, on Thursday, November 10, 1887. On the trial, defendants moved to strike out and suppress the deposition for the reason that appears on the face of the officer's certificate, that on the 10th of November, 1887, at 9 A. M., the notary adjourned the taking of testimony to the 11th of November following, at 3 P. M., at which time the deposition was taken. It does not appear that defendants, or any person or their behalf, were present at the time; but it does appear that the deposition was taken before Stephen Franklin Lazier, of the city of Hamilton, in the county of Wentworth, and province of Ontario, a notary public of royal authority, appointed within and for said province, and that it was taken at the city of Hamilton, in said county, "pursuant to the annexed notice;" but it does not state that it was taken at the office of S. F. Lozier, or at James street, or at South Hamilton, Ontario, Canada, or at any specified place. It does state that it was taken on the 10th of November, 1887, but shows on its face that the only thing done on that day was to adjourn to the 11th at 3 P. M. It is an inflexible rule that juridical depositions shall be commenced, and some progress made, under the notice for taking them, before adjourning to a future day; also that the deposition shall be taken at the place, *i. e.*, the office or room by the name or number of that of the notice, of the city or town in the notice specified.

It was error, then, to have overruled the motion to suppress the deposition on both or either of the grounds stated. It has usually been held that in order to suppress such deposition on account of irregularity in taking it, a motion for that purpose must be made before the trial is entered upon.

In the case at bar, a diminution of the record was suggested, and a certificate filed, for the purpose of showing,

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by the minutes of the trial judge, that the motion to suppress the deposition was not made until after the trial was entered upon. The certificate, however, fails to show it. The judge's minutes, as shown in the certificate, were in the following order:

"November 29. Jury waived by consent.

"December 21. Trial to court.

"December 21. Motion to suppress deposition overruled; defts. except.

"December 22. Continued."

Without noting the fact that the presentation or filing of the motion to suppress is not contained in the judge's minutes, it will be observed that the noting down of "trial to court" and "motion to suppress deposition overruled" in the order stated, without a certain indication of which first occurred, in point of fact, is not sufficient to establish precedence, in order of time, in one against the other, which ought, in good practice, to have taken precedence; but where the facts are noted as of the same date, as in this instance, that which should have been first moved will be construed to have been done first in point of fact.

But it appears from the bill of exceptions that upon the offering of the deposition in evidence the defendants made no objection to it as a whole, but made specific objections to certain portions of it, some of which were overruled, and others were sustained. In the case of *Starring v. Mason*, 4 Neb. 367, cited by counsel for defendants in error, a deposition was taken by the clerk of the district court of Arapahoe county, Colorado, who had no juridical authority to take it. On the trial the plaintiff moved to suppress it, which was overruled, and which, being subsequently assigned as error to the supreme court, the motion was there overruled. LAKE, Ch. J., said: "But notwithstanding this error of the court in refusing to suppress the deposition, in order to have made it available to the defendant, he should have objected to its being read to the jury on the

trial, and taken his exception if the court ruled against him," citing *Frost v. Goddard*, 25 Maine, 414. This point, therefore, can avail the plaintiffs in error nothing.

The only other point argued is that the finding of the court is contrary to the evidence.

It appears from the bill of exceptions that in 1878 the plaintiff purchased the quarter-section of land, including the forty acres in controversy, from the Maine Mutual Life Insurance Company, taking the deed in the name of his daughter, then Eleanor J. Dawson, who, being in New York, came out to Nebraska shortly before receiving the deed, bringing the defendant William J. Dawson with her. She received the deed, securing a portion of the purchase money by mortgage on the land, and soon afterwards returned to New York. In 1880 the mortgage was paid off and discharged. She stated in the deposition that all she did in respect to the land was for the plaintiff; that she paid for the same with money which she had received as the proceeds of his property which she had sold; that she never lived on the land nor received any rent or interest of any kind from it, but that the plaintiff lived on it continuously from about the time of its purchase forward; that afterwards, at his request, she conveyed it to him; that the wife of plaintiff, mother of defendants, went out to Nebraska in the year 1879 to live with the plaintiff; that witness saw them all living with the plaintiff on the land in question in the month of October, 1880; that the wife and mother died on the place in the year 1882, at which time the deponent last visited the family, and when they were all living comfortably on the land together.

There was evidence on the part of defendants tending to prove that before either of them left New York to come to Nebraska, as well as on their arrival, and at subsequent times, the sister, Eleanor, told them that if they would come out, and when there if they would work, cultivate, and improve the land, they should have it for their own,

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and a title to it, on coming of age; and there is evidence by other disinterested witnesses of such expressions and statements by Eleanor, on the two occasions of her visiting this property, in reference to it and her two brothers. These statements are denied by her in the deposition, and did not seem of sufficient credibility and weight to convince the trial court of the merits of the defendants' claim.

In a purview of the case I deem it not improper to refer to another transaction between the defendants and their sister. In 1880 she purchased another tract, a quarter of section twenty-five adjoining, from the same insurance company, taking the title in her own name, but stating to the agent from whom she bought it that she was buying it for her two brothers, the defendants, and that if they would prove to be good boys, and work and improve the land, it was to be theirs on their arriving of age. Some years afterwards they brought an action against her in the district court of Johnson county for the specific performance of her gift to them of the land. The case was brought to this court, and a decree was entered in their favor, confirming the title to them. (See 22 Neb. 131.) In that case no claim was set up by the present defendants to any land other than the quarter section involved, and not to the land in this suit. While much of the defendant's evidence in this case is but a reproduction of that of the former one, which served its purpose, and, as I think, spent its entire force upon the property then in litigation, it does not borrow from age and use an accelerating influence. It is true there is other testimony as to work and labor by them in the construction of pens and corrals on the land, but I think it falls short of establishing title in them to the land itself.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

26 722
42 328THE PIERCE MILL COMPANY, PLAINTIFF IN ERROR,
V. J. F. KOLTERMANN ET AL., DEFENDANTS IN
ERROR.

[FILED JUNE 13, 1889.]

1. **Mills and Mill-dams.** Where a mill-dam is built across a natural water course without leave to build or continue the same obtained under the provisions of the statute, one or more owners of lands overflowed or injured thereby, may prosecute proceedings, under the provisions of the statute, against the owner of such mill-dam for the damages caused by such overflow or injury; and neither in the pleadings nor upon the trial will the persons so proceeding be required to negative the existence of other property also overflowed or injured by reason of the erection of such dam, nor of other persons entitled to damages therefor; nor will the person so proceeding be required to prove or establish any fact which would be necessary or favorable to the owner of such mill-dam in a proceeding by him for leave to build or continue the same.
2. ———. An allegation of pleading that land was damaged by being "overflowed," held, established by proof that the water of the stream being set back by the dam and caused to stand at a greater depth in the bed of the stream, by reason thereof percolated through the earth so as to rise and stand therein within one and two feet of the surface.

ERROR to the district court for Pierce county. Tried below before CRAWFORD, J.

Edward P. Holmes, for plaintiff in error, cited: *Willoughby v. Shipman*, 28 Mo. 50; *O'Brien v. City of St. Paul*, 18 Minn. 176; *Solms v. Lias*, 16 Abb. Prac. (N. Y.) 311; *Williams v. Morland*, 4 D. & R. 583.

H. C. Brome, for defendant in error, cited: *Parker v. Boston & Maine R. R.*, 3 Cush. (Mass.) 107; *People v. Murray*, 5 Hill, 468.

COBB, J.

This action was tried in the district court of Pierce county, and was brought to this court on the petition of the Pierce Mill Company, the plaintiff in error.

Koltermann and Griebnow, the plaintiffs below, allege that they are the owners of certain described tracts of land in township 26 in said county; that the north fork of the Elkhorn river is a natural water course running through and across their lands; that in the year 1883, the defendant, a corporation duly organized under the laws of this state, erected a dam about nine feet high across said water course, and built a water grist mill one mile below their lands; that in November 1884, the defendant raised its dam to twelve feet, and in November, 1885, again raised it to fourteen feet, and maintained it at that height, by which their lands were overflowed and flooded to their damage respectively of \$2,500 and of \$2,000.

They further allege that the defendant has not paid nor in any manner compensated them for such damages; nor have any proceedings been had or instituted by defendant, or other persons, for the purpose of ascertaining such damages or determining the right of the defendant to erect and maintain said dam, or for a writ of *ad quod damnum* in the premises; with prayer for such writ and relief.

The defendant, by its amended answer, denied all the allegations of the petition.

2. That it erected and maintained its dam across the Norfolk river on its lands at a height not to exceed twelve feet.

3. By reason of which the plaintiff's lands have not been overflowed or damaged in any sum whatever, but have been greatly benefited and increased in value.

The writ having been issued to the sheriff of said county as prayed for, and an inquest having been held as provided for by law, damages were assessed to the plaintiff Koltermann, of \$900, and to Griebnow of \$750, to which assess-

ment and return the defendant filed its objections and motion to quash, which were overruled.

There was a trial to a jury with findings for the plaintiffs and verdict of \$642.35 for Koltermann and \$481.76 for Griebnow, on which judgment was entered.

When the owner of a mill already erected, or when a person desiring to erect a mill, for the purpose of establishing a right or privilege to occupy or overflow the lands of another person or persons, goes into court for that purpose, the statute points out the course which he is to pursue, which is quite the same in principle as that necessary to be pursued by railroad companies in acquiring rights-of-way for tracks over the lands of others, and, as in such cases, the provisions of the statute must be substantially followed. The object of the statute is to provide an effective, expeditious, and inexpensive, method of ascertaining whether the erection of the mill, with its necessary dams, etc., at the point indicated, in view of its public utility, its probable effect on the neighborhood, its effect on the free passage of fish in the stream, and other considerations of a *quasi* public character, privilege to erect such mill should be granted, and, if so, what amount of damage will be sustained by the several inhabitants and property-holders to be affected thereby. This proceeding would of course be equally effective, as well as more expeditious and less expensive, by embracing all parties affected in one action. The plaintiff, a mill owner, is equally interested in having his privilege established against all persons and property interested, or which may be the subject of damage by reason of the improvement. Hence the law imposes the duty upon him to give them all notice, makes the assessment of damages general, as well as to each individual property holder, and gives to all a standing in court, from which to show, if they can, that the mill is not a work of public utility; that its erection would be injurious to the public health of the neighborhood, or would

prevent the free passage of fish in the streams; and many courts have held that the record must show affirmatively that all such persons have been duly notified, so as to take part in the proceedings, or a judgment establishing the plaintiff's privilege to erect and maintain the mill, would not be upheld.

Section 14 of our Mill-Dam Act (Chap. 57, Comp. Stats.) provides that:

"Where any person may have built a mill or other dam, whereby the water of any river, creek, run, or spring, may be rendered stagnant, or any lands may be overflowed or injured thereby, any person, or any number of persons, interested therein, or who may be damaged by the stagnation or overflowing of said water, or otherwise, may file a petition against the owner of such mill-dam, for such writ, and like proceedings shall be had *mutatis mutandis*, as where the owner of a mill-dam so built brings the petition. But such owner shall have ten days' previous notice of the filing of the petition."

Section second of said act provides in reference to the proceeding of the person desiring to erect a dam that he shall set forth in his petition as near as may be, among other things, and shall describe with certainty, the lands above and below such dam, the property of others which are or will probably be overflowed or injured as aforesaid, and shall give the name of the owner of each tract, or, if the name of any such owner be unknown, the plaintiff shall so state in his petition.

It seems to me there need be no trouble nor difficulty in understanding not only that the statute itself which requires the petition in the one case to set out the names of all land-owners above and below the dam in the second section, does not apply to proceedings under the fourteenth section, but that the reason of such rule, which is plain and obvious when applied to one, is entirely wanting when applied to the other. Neither the letter nor the spirit of the

law requires that a proceeding under the fourteenth section should be necessarily commenced by all of the persons whose property may be injured by the erection of the dam, while that of the second section, where the proceedings are commenced by the mill owner, clearly requires that he should bring in all persons interested, and that his record should negative the existence of any others.

The plaintiffs in the case at bar confine their complaint and suit to the ascertaining and recovery from the mill owners of the damages sustained by them severally in their property by reason of the setting back of the water over and upon their land by reason of the said dam. They did not seek to litigate the propriety of the location of the dam at that point as a work of public utility. They did not desire to investigate the effect that the dam would have upon the public health. They did not even desire to enter upon a discussion of, nor claim any interest in, the important question of the free passage of fish in the waters of the stream. They instituted the action for the sole purpose of settling and recovering their damages as stated. Can it be doubted that they had a right to present this question alone? Nor were they under obligation, either imposed by the law or in common reason, to assume the duty of hunting up and investigating the property and rights of other parties of even a like character, much less that their right to proceed at all could depend upon bringing in all such claimants, or that the validity of their record depends upon, or would be made to depend upon, their having presented and litigated and the court having passed upon every other question which could have been raised in a proceeding by the mill company to establish and settle their privilege.

Having examined twenty-one of the cases cited by counsel for the plaintiff in error, I find each of them, with possibly one exception, and that not clearly so, to be cases where the proceedings were commenced for the purpose of establishing the privilege of the miller to erect and main-

tain a dam; and I find nothing in either in conflict with the views expressed.

Under the third head, counsel present the point that the language of the petition is that plaintiff's damage was caused by "the overflow of water," hence that the court erred in the admission of evidence that the plaintiff's property was injured by the result of the percolation of water through the same. Although it is not pointed out in the brief, the evidence to which I presume counsel refers is the following, from the testimony of plaintiff Koltermann:

Q. When that dam is maintained at the height of fourteen feet, you may state what is the width and size of that stream of water at the point where it runs through your land.

A. I once measured it from four or five different places. It measured from sixty to one hundred feet wide.

Q. What was its depth?

A. Where my land begins, on the south side, it was fully ten feet deep; on the upper side it was six — on the west side.

Q. What effect, if any, does that condition of affairs have upon your facilities for crossing the stream?

A. I have to go around the public road to the county bridge and go across there; go across to Griebnow's for about twelve rods, and go on the line.

Q. What distance is it, more?

A. From my house it is about fifty rods to the bridge.

Q. Well, the distance clear around?

A. Clear around, it would make it about ninety rods, I would say — clear around to my barns and stables.

Q. Where was your house?

A. On one side of the stream.

Q. And your barns and stables?

A. They were on the same side of the stream, but the other side of the road.

Q. What was the character of your land adjoining to this stream?

A. It was level bottom land.

Q. What effect, if any, had the maintenance of this dam at the height of fourteen feet, and kept so full of water, upon the balance, or any portion of the tract, other than that actually occupied by the stream?

A. The land on the west side of the creek is all low and very level. This body of water was high on the farming ground. I could get water within two feet of the top of some of it.

Defendant's motion to strike the last answer from the record, for the reason that it is an attempt to prove a condition of affairs not charged in the plaintiff's petition, was overruled by the court, and exception taken.

The witness continued: And on some of my hay land the water was as close as one foot of the top of the land.

Q. What effect does that condition of affairs have on the use of the land?

A. I had forty-five acres of hay land there; at least thirty acres of it turned into smart grass, and sword grass; no cattle will eat it at all.

Q. Was any portion of the land affected in this way cultivated land, plowed land?

A. Yes, the water was within two feet of the top.

Q. How many acres of your land was affected in that way?

A. There are 130 acres on the west side of the creek; that is all low and level.

The word "overflow," when applied to the surface of land, doubtless is correctly defined in Webster: "To fill beyond the brim or margin; to deluge; to submerge; to drown;" but its sense as used in the plaintiff's petition is not necessarily confined to the surface of the land, but to the ground itself, which, according to Blackstone, reaches to the center of the earth.

It is fairly deducible from the testimony quoted that the plaintiff's land within one and two feet of the surface was

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as free from water as agricultural lands ordinarily are, but by means of the dam the water was so set back in the stream as to under-flow the ground within one and two feet of the surface. The foundation of the evidence to this effect was, I think, sufficiently laid in the petition in the words *overflowed and greatly injured*.

There seems to have been a long and exhaustive trial in the court below, conducted with discretion, and without complaint that the damages found for either plaintiff are excessive.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

AUGUST MEYER, PLAINTIFF IN ERROR, V. JEROME SHAMP, DEFENDANT IN ERROR.

[FILED JUNE 13, 1889.]

1. **Res Adjudicata.** A judgment or ruling of this court in a case or point distinctly and finally made will be held to be the law of the case in which made throughout its course of litigation; without regard to the number of times it may be brought before the court, or to the intrinsic merits of such judgment or ruling. (*Hiatt v. Brooks*, 17 Neb. 33; *Leighton v. Stuart*, 19 Id. 546; *Marion v. State*, 20 Id. 247; *Lane v. Starkey*, Id. 586.)
2. **Partnership: GUARANTY: ACTION: PLEADING.** D. W. & S. were a firm owning goods and carrying on a business and owing partnership debts. S. sold out his interest to G., whereupon and in consideration of such sale, the new firm of D. W. & G. guaranteed to pay all the debts of the old firm of D. W. & S. and keep S. harmless in respect thereto. Afterwards, W. sold out his interest to N., whereupon and in consideration of such sale, the new firm of D. N. & G. guaranteed to pay all the debts

26	729
45	684
28	729
51	422
28	729
62	823

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of the firm of D. W. & G. and keep W. harmless in respect thereto. Afterwards, the firm composed of D. N. & G., by the name and designation of D. N. & Co., sold to M. a one-fourth interest in said goods and business, whereupon said new firm of D. N. G. & M. guaranteed to pay all the debts and liabilities of the said preceding firm of D. N. & Co. Afterwards D. sold his interest in said goods and business to said M. N. & G., who guaranteed to pay all the debts and liabilities of the said firm of D. N. & Co. and to keep D. harmless in respect thereto, including all the debts and liabilities above mentioned. Afterwards the said last firm of N. G. & M. was dissolved by the withdrawal of G., in consideration of which N. & M. guaranteed to pay all the debts and liabilities above mentioned; and afterwards the remaining firm of N. & M. dissolved, M. retaining all the property and effects of the said partnership, and in consideration thereof guaranteeing to pay all the debts and liabilities of said last-named partnership, including the debts and liabilities above described. None of said several firms paid all of the debts of the original firm of D. W. & S.; but after the sale by W. to N., certain of the said debts remaining unpaid, S. and W. were obliged to pay and did pay them. In an action by S. in his sole name against M. on his guaranty to pay said debts and keep him, S., harmless in respect thereto, *held*, that the petition without an allegation of the payment of such debts and liabilities by S. and W. and the assignment of his interest in such payment by W. to S., is insufficient.

ERROR to the district court for Lancaster county. Tried below before FIELD, J.

Sawyer & Snell, for plaintiff in error, cited: *Meech v. Ensign*, 44 Am. Rep. 227; *Kountz v. Holthouse*, 85 Pa. St. 235; *Robb v. Mudge*, 14 Gray, 534; *Tweddle v. Atkinson*, 1 B. & S. 393; (S. C. 101 Eng. Com. Law 392;) *Carr v. Bank*, 107 Mass. 45; *Hall v. Huntton*, 17 Vt. 244; 2 Wharton on Contracts, sec. 787; Lindley on Partnership, p. 392; *Austin v. Seligman*, 18 Fed. Rep. 519; *Johnson v. Morgan*, 68 N. Y. 497; *Parmalee v. Wiggenghorn*, 6 Neb. 326.

Cornish & Tibbetts, and *O. P. Mason*, for defendant in error, cited: Bates on Partnership, 634; *Smith v. Teer*, 21

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Up. Can. Q. B. 412; *Carr v. Roberts*, 5 B. & Ad. 78; *Smith v. Howell*, 6 Exch. 730; *Pope v. Hays*, 19 Tex. 375; *Bennett v. Caldwell's Exr.*, 70 Pa. St. 253.

COBB, J.

This cause was before this court, on error to the district court of Lancaster county, at a former term. A general demurrer to the petition had been sustained, and the cause dismissed. The opinion of this court, reversing the judgment of the lower court and remanding the cause for further proceedings, is to be found in volume 20, p. 223. The cause was tried to a jury, with a verdict and judgment for the plaintiff, and is now brought up by proceedings in error by defendant, who by brief and argument of counsel presents eighteen points of error.

The first four points are devoted to the review of the question decided in the former opinion above referred to.

In the case of *Hiatt v. Brooks*, 17 Neb. 33, we held (following *Phelan v. San Francisco*, 20 Cal. 45) to the effect that a previous ruling or judgment of this court upon a point distinctly made, would be held to be the law of the case in which made, throughout its course of litigation, without regard to the number of times which it might come before the court, or to the intrinsic merits of such ruling or judgment. This holding was adhered to in the subsequent cases of *Leighton v. Stuart*, 19 Neb. 546; *Marion v. State*, 20 Id. 247, and *Lane v. Starkey*, Id. 586; and is believed to be the law. The points above referred to, therefore, being within the former ruling and opinion, will not be examined here.

The fifth, sixth, seventh, eight, and ninth, points of the brief are based, at least in great part, upon the giving of of the eighth instruction by the court on its own motion. I here copy the instruction :

“If you find from the evidence that Wallingford &

Shamp paid any of the sums sued upon, and that prior to the commencement of this action Wallingford sold his interest to the plaintiff, then the plaintiff would have the same rights in the premises as though he had paid the debts himself."

The objection of counsel to this instruction is based upon the fact that it is not alleged in the petition that Wallingford & Shamp paid any of the sums sued upon, and that Wallingford afterwards sold his interest therein to the plaintiff; but, on the contrary, it is alleged in the petition that neither the defendants, Dawson, Geisler, Wallingford, nor either of said co-partnerships, had or have paid said indebtedness, nor any part thereof, and that plaintiff had been compelled to pay all of said indebtedness and obligations. And counsel contend that proof to the effect that this indebtedness was paid by Wallingford & Shamp, and that Wallingford had assigned to plaintiff his interests therein, does not meet the allegation that plaintiff alone had paid it.

By reference to the petition, set out at length in the former opinion, and reported in the case above referred to, the allegation will be found be that, "On the 9th day of November, 1880, the plaintiff sold all of his interest in said partnership to one John Geisler, the firm of Dawson, Wallingford & Geisler assuming and agreeing to pay all of said debts and save the plaintiff harmless; that in December, 1880, said Wallingford sold and transferred his interest in said firm to Dawson, Geisler, and one C. Nahrung, in part consideration of which, said three persons agreed to pay all the debts of Dawson, Wallingford & Geisler, and save said Wallingford harmless;" with other subsequent sales and transfers by the several persons and partners therein named, with like assumptions and guaranty on the part of the purchasers and remaining owners and partners until and by means of which the defendant became the sole owner and guarantor. The plaintiff and Wallingford were, nevertheless, still bound to the creditors of the original firm of

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Dawson, Shamp & Company. And so if upon the failure of the guarantors to pay any of said guaranteed indebtedness, the plaintiff and Wallingford paid the same, it became a *chose* in action in their hands against the guarantors, and finally against the defendants as sole guarantors. Such *chose* in action was assignable from Wallingford to the plaintiff, and, being so assigned, could be sued on by him in his sole name as the lawful owner and holder thereof; and in that case as a matter of pleading it was necessary to set out its payment by plaintiff and Wallingford, and the assignment by Wallingford of his moiety to plaintiff. But the point urged by plaintiff in error is that there is no allegation of payment by plaintiff and Wallingford in the petition; nor if they did pay any of said indebtedness, that the interest of Wallingford therein, or to be repaid therefor by his grantee and guarantor, or those claiming under him, ever passed to the plaintiff by assignment; that, therefore, the above instruction was not only inapplicable to the pleadings, but that the evidence of the payment of any part of said indebtedness by Wallingford & Shamp, or Wallingford, Shamp & Company, was inadmissible for the want of pleadings on which to base the same; and that all such evidence, being admitted over defendant's objection, was erroneously admitted; and that for such error, as well as that of the giving of the above instruction, the judgment ought to be reversed.

It appears by the bill of exceptions that the plaintiff, being on the stand as a witness in his own behalf, and having testified as to the sale by him to Mr. Geisler of his share and interest in the partnership property and business, the sale by Wallingford to Mr. Nahrung, of his share and interest in the said partnership property and business, and the terms of such sales, including that the purchasers assumed all the indebtedness and liabilities of the firm; also of the purchase by the defendant of a one-fourth interest of the property and business of the partnership, etc., and hav-

ing testified that at the time of the said several sales, purchases, and assumptions, the old firm of Dawson, Shamp & Co., was indebted to the La Belle Wagon Company as security upon a note of one Peter Davey, a note and check being exhibited to him, testified that the note was given for a wagon, and that the check was given for the note; that the note was given by Peter Davey, and was paid by plaintiff; that it was one of the notes which the firm he sold out to, agreed and undertook to pay. Plaintiff then offered the check in evidence, to which defendant objected, for the reason that it was not the check of the plaintiff, but of Wallingford, Shamp & Company, etc., which objection was overruled and the check admitted in evidence. Witness being shown another paper, was asked what it was given for, and replied that it was given for an indorsement—indorsed paper of the R. E. Elwood Manufacturing Company; that it was an indebtedness of the firm of Dawson, Shamp & Company at the time plaintiff sold out his interest; that it was one of the debts that the firm agreed to pay, and that the plaintiff subsequently paid it. Witness continued: (I copy his testimony from the bill of exceptions:)

This was the note that Burr protested. That was paid; it had not been paid. We took up that indebtedness with that amount, \$157.

Q. With that check?

A. With that check, yes.

Q. Who has paid that?

A. I have paid it.

Q. You individually?

A. Yes, sir.

The check being offered in evidence, defendant objected for the reason that it shows that it was drawn in favor of F. E. Hills or bearer, and drawn by Doolittle, Shamp & Company, and other reasons. The objection was overruled, and the evidence admitted.

The examination was continued :

Q. Look at the paper I now hand you and state what the money was applied for.

A. This was applied on a Peru planter.

Q. Was that one of the debts existing against the firm of Dawson, Shamp & Company at the time you sold out?

A. Yes, sir.

Q. I will ask you if that is one of the notes that the parties to whom you sold out assumed to pay?

A. Yes.

Q. By whom was it paid?

A. That note was paid by me.

Q. Is that the check on which the money was paid?

A. Yes.

Plaintiff offered check in evidence. Defendant objected for the reason that the check was drawn by Wallingford, Shamp & Company, and not by the plaintiff, etc., which objection was overruled and the evidence admitted. The witness testified to other payments of the same general character.

Upon cross-examination the plaintiff recapitulated and reenumerated the several debts guaranteed by defendant, and which had been paid by him. Referring to the first in order of these debts, defendant asked :

Q. Who paid that?

A. This we paid, I think. I and Wallingford paid these notes.

Q. I want to know whether you, or you and Wallingford?

A. Well, this note I think we paid together.

Q. You paid it as Wallingford & Shamp—as a company?

A. Yes, sir; not as a company, but I and him individually.

Q. Together then, but not as a company?

A. Yes, sir.

Q. The next item?

A. Frederick Witte.

Q. How much?

A. Thirty dollars.

Q. Paid by Wallingford & Shamp?

A. Yes. * * *

Q. Well?

A. One hundred and fifty-seven dollars to F. E. Hills, for the Elwood Manufacturing Company, May 12, 1883.

Q. That was paid by Wallingford & Shamp?

A. Yes; if there is any difference I will state. Ninety-five dollars and seventy six cents, October 4, 1882, to J. H. Brown, Justice of the Peace, for La Belle Wagon Company. Magnus Lawson, eighty dollars; * * * check to Harwood, Ames & Kelly for thirty-seven dollars and sixty cents, for Hunt, Dunn & Co.; nineteen dollars to J. T. Clark, for T. H. Smith; to L. C. Burr, twenty-seven dollars and fifty cents; the La Belle Wagon Company, or B. F. Moore, two hundred and sixty dollars.

Q. All these items were paid by Wallingford & Shamp?

A. At the time my recollection is they are; perhaps not all of them; I cannot refresh my memory sufficiently to say whether or not one or two were paid by myself without looking up the matter. * * *

Q. After Wallingford had paid this you say you bought?

A. Why, yes; Wallingford assigned his claim to me—that is, verbally.

Q. Verbally?

A. Yes.

Q. Was it all in talk he assigned over to you?

A. Yes, sir.

Q. When was the assignment made?

A. Well, that I cannot say. It was before this suit was brought. About the time the suit was brought, I think.
* * * * It was an agreement that I should take

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the entire indebtedness. He owes me for it and I owe him.

The record then appears to me to be open and subject to the objection made to it by the counsel for the plaintiff in error. While I do not doubt that with the necessary allegation of payment by Shamp & Wallingford, and of the assignment of the claim for repayment thereof under the guarantys of the said contracts of purchase by Wallingford to Shamp, the action could be maintained, yet without such allegations in the petition, I do not see that either the instruction above set out, or the admission of the testimony objected to, can be sustained.

The judgment of the district court is therefore reversed, and the cause remanded to that court for further proceedings in accordance herewith, and with instructions to that court to allow the plaintiff to amend his petition as he may be advised.

JUDGMENT ACCORDINGLY.

THE other Judges concur.

CLYDE S. MUSSELMAN, PLAINTIFF IN ERROR, v. SARAH JANE BARKER, DEFENDANT IN ERROR.

[FILED JUNE 13, 1889.]

1. **Attorney and Client.** Where an attorney was employed to defend a prosecution in bastardy and in violation of his retainer sought to appear for the plaintiff in the action, and was perpetually enjoined from so doing, such retainer and injunction will not prevent him from accepting a retainer and appearing for the plaintiff in a suit for damages resulting from a breach of contract for marriage, the plaintiff and defendant being the same as in the prosecution for bastardy.
2. **Marriage: BREACH OF PROMISE: DAMAGES.** The loss of social standing in the community in which a plaintiff in an action for

damages for breach of promise of marriage resides, caused by the seduction of the plaintiff, is an element of damages to be considered in such action, and a ruling of the trial court permitting the plaintiff to state in her evidence that since, she had been "suceded at" upon the streets in the city in which she resided, would not be error requiring the reversal of a judgment rendered upon a verdict in the plaintiff's favor.

3. ———: ———: EVIDENCE. In such case it was not error for the court to permit the plaintiff to testify that the defendant was the father of an illegitimate child, begotten by him while the agreement for marriage existed, and on the faith thereof on the part of the plaintiff in the action.
4. Witnesses: EXAMINATION. Where, upon the examination in chief of a defendant, a question is propounded to him the answer to which is excluded, upon objection of the plaintiff, a reviewing court will not inquire whether the trial court erred in excluding the evidence if it appears that the witness was afterwards interrogated, and testified fully upon the subject upon which he was interrogated.
5. Verdict. The evidence examined, and held, sufficient to sustain the verdict of the jury.
6. Marriage: BREACH OF PROMISE: DAMAGES. In an action for damages for a breach of promise of marriage, where there was sufficient evidence to justify the jury in finding that the promise was made, and that the defendant had seduced the plaintiff through and by reason of her reliance upon his promise, it was held, that a verdict in favor of the plaintiff for \$7,000 damages was not excessive.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

L. W. Colby, for plaintiff in error, cited: *Valentine v. Stewart*, 15 Cal. 387; *Commonwealth v. Gibbs*, 4 Gray, (Mass.,) 146; *Price v. Grand Rapids, etc., R. R. Co.*, 18 Ind. 137; *Herrick v. Catley*, 1 Daly, (N. Y.,) 512; *Sherwood v. Saratoga & Washington R. R. Co.*, 15 Barb. (Id.) 650; 2 Parsons on Contracts, 67; Addison on Contracts, 581-4.

T. Judson Ferguson, and *B. C. Oylar*, for defendant in error, cited: Bliss, Code Pleadings, 1st Ed. sec. 1; 3 Suth-

erland on Damages, pp. 316, 317; *Kniffen v. McConnell*, 30 N. Y. 285; *Sherman v. Rawson*, 102 Mass. 395; *Leavitt v. Cutler*, 37 Wis. 46; *Price v. Grand Rapids, etc., R. R. Co.*, 18 Ind. 137; *Willard v. Stone*, 7 Cowen, 22; S. C., 17 Am. Dec. 496; *Miller v. Hayes*, 34 Iowa, 496.

REESE, CH. J.

This action was instituted in the district court for damages resulting from the breach of a marriage contract, the damages being laid at \$10,000. A jury trial was had, which resulted in a verdict in favor of defendant in error, and assessing her damages at \$7,000. A motion for a new trial was filed, which was overruled when a judgment was rendered upon the verdict. Plaintiff in error, who was defendant in the district court, brings the cause to this court for review by proceedings in error.

The motion for a new trial was based upon the following grounds:

"1st. Because the verdict is contrary to the evidence.

"2d. Because it was not sustained by sufficient evidence.

"3d. Because the verdict was contrary to law.

"4th. There was error in the assessment of the amount of recovery, the same being too large.

"5th. Because there was error of law, occurring at the time of the trial, and excepted to by the plaintiff.

"6th. The court erred in allowing plaintiff's attorney to prosecute said action.

"7th. The verdict was contrary to the instructions asked by the defendant, and given by the court.

"8th. Because the verdict was contrary to the fourth instruction given by the court on motion of defendant.

"9th. Because the damages are excessive, and were given under the influence of passion and prejudice."

Such of these grounds as are discussed in plaintiff's brief will be noticed here in the order in which they occur therein.

It appears from the record that T. J. Ferguson, who was one of the attorneys for defendant in error, had formerly been employed by plaintiff in error as his attorney in certain bastardy proceedings which had been instituted against plaintiff in error by defendant in error, and that he sought to appear against plaintiff in error in that prosecution, but was enjoined from so doing by the district court. The record in that case was not introduced in evidence upon the objection made to Mr. Ferguson's appearance in this case as counsel for defendant in error; but the journal entry by which the injunction was made perpetual was introduced. As shown by that decree, the court found "That the plaintiff, Clyde S. Musselman, employed and retained the defendant, T. J. Ferguson, to assist in his defense in certain bastardy proceedings brought against him by Sarah Jane Barker; * * * that at the time plaintiff employed said Ferguson, and ever since said time, the said Ferguson has been and now is a duly admitted practicing attorney in the courts of record in the state; * * * that after accepting the retainer by said Ferguson of said plaintiff, and after the employment of him as aforesaid, said Ferguson acted as counsel for the said Sarah Jane Barker, and instituted a suit for the said Sarah Jane Barker similar to this one, and for the same purpose in which he was employed by this plaintiff to defend this said plaintiff; * * * that he was proceeding in said action at the commencement of this action."

Upon these findings a decree was entered perpetually enjoining the said Ferguson from acting as attorney for said Sarah Jane Barker, or Thomas Barker, (her father,) in any action or proceeding brought or to be brought by them, or either of them, or any one in their behalf, "Wherein it has been attempted or shall be attempted to declare the plaintiff the putative father of said child of said Sarah Jane Barker, * * * and that he be perpetually enjoined and restrained from divulging any communication made

to him by said Musselman or any one on behalf of said Musselman while he was acting as attorney for said Musselman in said proceedings," etc. The court overruled the objection and allowed Mr. Ferguson to appear for defendant in error and prosecute this case, and the ruling so made is now assigned as error.

While this record may not be considered as commendatory of the course sought to be pursued by the attorney named, yet we cannot see that the fact that he had been employed by defendant in error in the bastardy proceedings referred to would necessarily prevent him from acting as counsel for defendant in error in this action for damages resulting from a breach of contract. While it is true that the fact that while the agreement or contract for marriage existed, plaintiff in error made use of the agreement as a means for seducing defendant in error, was competent evidence for the purpose of enhancing damages, (*Matthews v. Cribbett*, 11 O. St. 330; 3 Sutherland on Damages, 316, and cases cited in note; *Tubbs v. Van Kleeck*, 12 Ill. 446; *Coil v. Wallace*, 4 Zab. [N. J.] 291;) yet the fact that such seduction resulted in pregnancy and childbirth would not necessarily become a material inquiry, except as it might incidentally arise as corroborative of the evidence offered to support the charge or cause of action alleged by the plaintiff in the suit. Neither could it be said that in bastardy proceedings it would be essential to prove a contract of marriage in order to maintain the action. Therefore we can see no legal reason why the fact of the retainer of the attorney named to defend in the bastardy proceedings should prohibit the acceptance of a retainer from the plaintiff in that suit to prosecute an action against his client for breach of contract for marriage. (*Price v. R. R. Co.*, 18 Ind. 137.)

While defendant in error was a witness upon the stand in her own behalf, she was asked to state if prior to her going with plaintiff in error she was accustomed to going into society, which question she answered in the affirma-

tive. She was then asked if she had been able to go into society since, which she answered in the negative. The following question was then asked: "Do you know of any person sneering at you on the street?" This question was objected to as immaterial, irrelevant, and incompetent, which objection was overruled, and an exception noted. The witness then answered, "Yes, sir; they have." This ruling of the court is now complained of. We do not think the court erred in this ruling, and did we think otherwise we would have to hold it to be error without prejudice. It was competent for defendant in error to prove that by the refusal on the part of plaintiff in error to comply with the alleged contract of marriage she had been deprived of her standing in society, and indeed any other fact produced by him in consequence of the alleged agreement. This was substantially conceded by plaintiff in error by his silence when the preceding questions were asked and answered. The question under consideration was of substantially the same character, and could add little, if anything, to her former evidence.

It is contended that the court erred in permitting defendant in error to testify that plaintiff in error was the father of an illegitimate child, which defendant in error had with her at the trial. As we have seen, the fact of the seduction and disgrace were proper subjects of proof. The only objection which can be seen to the question is that it was for the purpose of identifying that particular child as the one born from the intercourse alleged to have taken place between plaintiff and defendant during the existence of the alleged agreement. This, while not necessary, could not be prejudicial even if erroneous.

During the trial and while plaintiff in error was upon the witness stand as a witness in his own behalf, the following occurred, as shown by the bill of exceptions:

Q. Have you found out that this lady was accustomed to drink sometimes? [Plaintiff objects, as immaterial, ir-

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relevant, and incompetent. Sustained. Defendant excepts.]

Q. What are the facts in regard to your hearing anything about this plaintiff in regard to her temperance or chastity? [Plaintiff objects as immaterial, irrelevant, and incompetent. Overruled. Plaintiff excepts.]

A. I have been told that she drinks. [Plaintiff objects and moves to strike out as hearsay. Sustained. Defendant excepts.]

Q. Have you ever ascertained from report or otherwise, until lately, that Miss Barker ever drank anything, or did you hear anything, until lately, as to her chastity? [Plaintiff objects as immaterial, irrelevant, and incompetent.]

A. No, sir.

Q. When did you hear it; since this action was commenced?

A. Yes, sir.

It is now insisted that "The court erred in refusing to admit the questions and answers of the defendant," as above shown, where the rulings were against plaintiff in error. The evident purpose of plaintiff in error in introducing the inquiry as to the character and reputation of defendant in error, was to show that at the time of his refusal to comply with his contract and consummate it by marriage, he had a good and sufficient excuse for refusing to proceed further, for it is said in his brief: "It is a sufficient excuse for a breach of a promise to marry if the person to whom the promise is given turns out upon inquiry to be a person of bad character. Immodesty, drinking intoxicating liquors, a lack of chastity, lewdness, untruthful statements, are each held to be a legal excuse for breach of promise." In support of this a number of authorities are cited. The extract we here make from the bill of exceptions shows clearly that plaintiff in error, if a contract of marriage existed, had no such excuse for its breach as was sought to be established. All he had ever heard of the

reputation or character of defendant in error, had been said after the breach and after the commencement of the action, and, as he testified on his cross-examination, when he was looking for evidence to be used in his defense. While we think the ruling of the court was correct, yet all the facts within the knowledge of plaintiff in error, and which could aid him in his defense, were fully testified to by him.

It is contended that the court erred in its instructions to the jury; but as the attention of the trial court was not called to any of the instructions by the motion for a new trial, they cannot be considered here.

The same must be said with reference to the contention that the court erred in refusing to strike out certain parts of the petition, as no assignment of the kind is found in the motion for a new trial or petition in error.

The next contention is that the verdict was not sustained by sufficient evidence. Defendant in error testified positively to the promise being made and its oft repetition. In this she was supported by two other witnesses, who testified to statements made by plaintiff in error in which he recognized the existence of the agreement. Other evidence, more or less corroborative, was submitted to the jury, and, notwithstanding the positive denial of the contract, the intercourse, or any attention being paid to defendant in error on his part by plaintiff in error, we cannot molest the judgment on that ground. It fully appears that the parties were of lawful age to make the contract, and that defendant in error had attained her majority prior to the commencement of the suit. These objections to the judgment are unavailing.

The next and only remaining contention is that the verdict was excessive. Upon this question it may be admitted that from what appears of record the verdict seems to be large. But in an action of this kind, while it is nominally for the breach of contract, yet, in regard to the recovery of damages, such recovery is not limited by the ordinary

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rules. It is peculiarly a question for the jury, and the verdict will not be set aside as excessive unless the amount is so large as to show that the jury were influenced by passion or prejudice. (Maxwell's Pl. and Pr. 141, and cases cited; Thompson on Trials, sec. 2064; 3 Sutherland on Damages, 319.) If the testimony of defendant in error and her witnesses was true—and of this the jury were the sole judges—while the verdict may seem large, yet the damage inflicted cannot be compensated by the amount named.

We find no error in the proceedings of the district court, and its judgment is affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

WITHERINGTON JOHNSON, PLAINTIFF IN ERROR, V.
SAMUEL T. BOWMAN, DEFENDANT IN ERROR.

[FILED JUNE 13, 1889.]

1. **Work and Labor: WARRANTY: TRIAL: ONUS PROBANDI.**

In an action by a plaintiff to recover the price of the sinking of a well, it was alleged in the petition that defendant agreed to pay the plaintiff for the work fifty cents per foot for the first hundred feet, sixty cents for the next fifty feet, and seventy-five cents per foot for all over one hundred and fifty feet. The answer consisted, first, of a general denial; second, of an allegation in substance, that the plaintiff had undertaken to sink and curb a well for the defendant for the price per foot named in the petition, but that the plaintiff had agreed and warranted that the well should yield a specified quantity of water per day, and in case of failure so to do, nothing should be paid the plaintiff for sinking the well. This was denied by the reply. It was held, that an instruction to the jury that the burden of proof to sustain the warranty was on the defendant in the action, was not erroneous.

2. ———; ———; ———. In such case an instruction that if there was a warranty and breach thereof, but that if the plaintiff did not expressly agree that in case the well did not yield the quantity of water named in the answer, he would charge nothing therefor, and if the jury found the well was of any value, the plaintiff's recovery should be the contract price less the amount it would cost to complete the well, was not erroneous as inapplicable to the evidence.

ERROR to the district court for Nance county. Tried below before POST, J.

Geo. D. Meiklejohn, and *Sullivan & Reeder*, for plaintiff in error, cited: *Greenleaf on Evidence*, sec. 51; *Stephen on Pleading*, secs. 84, 85.

W. F. Critchfield, and *J. W. McClelland*, for defendant in error, cited: *Schreckengast v. Ealy*, 16 Neb. 514.

REESE, CH. J.

This action originated in one of the inferior courts of Nance county, where such proceedings were had as resulted in an appeal to the district court. In that court defendant in error filed his petition in which he sought to recover the sum of eighty-four dollars, which he alleged was due him from plaintiff in error for services rendered for sinking a well. It is as alleged that plaintiff and defendant entered into an oral agreement by the terms of which defendant in error agreed to sink a well for plaintiff in error, for which plaintiff in error was to pay fifty cents per foot for the first one hundred feet, sixty cents a foot for all over one hundred feet and under one hundred and fifty feet, and seventy-five cents per foot for all over one hundred and fifty feet in depth of said well; that plaintiff in error agreed to furnish one full hand to assist defendant in error in sinking said well, or to repay defendant in error all moneys paid by him for such assistance; that in pursuance of said

agreement, defendant in error sunk a well for plaintiff in error on plaintiff's farm in Nance county, to the depth of one hundred and fifty-four feet, and also paid one E. Harman for his assistance in sinking the same, the sum of fifteen dollars; and that the whole amounted to ninety-eight dollars, upon which fourteen dollars had been paid.

The answer of plaintiff in error consisted, first, of a general denial of the allegations of the petition. Second, it was alleged that "Plaintiff promised and agreed with defendant that he would bore, sink, and curb, the well for defendant on his stock farm, for the consideration of the sum of fifty cents per foot for the first one hundred feet, sixty cents per foot for the next fifty feet, and seventy-five cents per foot for each foot over and above one hundred and fifty feet; and plaintiff should put in one-and-a-half-inch tubing for the first thirty feet curbing at the bottom of the well, the balance of said curbing to be constructed of one-inch tubing; that said well was to be completed during the fall of 1885; that plaintiff then and there covenanted and agreed with defendant to warrant and guaranty said well to supply defendant with twenty barrels of water every twenty-four hours, and if plaintiff failed to furnish defendant such supply of water, plaintiff would have no pay for said well; that upon plaintiff's failure to sink the well in the year 1885, as per his contract, it was mutually agreed that the well should be sunk in the spring of the year 1886; that the well was sunk to the depth named in the petition, but that it failed to furnish the quantity of water agreed to, and that plaintiff had still failed to furnish defendant with a well according to the terms of said contract, or a well which had supplied twenty barrels of water every twenty-four hours, which by said contract plaintiff had agreed and warranted, and that therefore there was a failure on the part of plaintiff to comply with the contract set out in the answer; that upon the failure of the well to furnish the quantity of water required, plaintiff agreed to

return in the fall of the year 1886, and sink the well fifteen or twenty feet deeper, in order to make it comply with the terms of the contract, but that he had failed so to do; that owing to the failure of plaintiff to sink the well in compliance with his contract to furnish the amount of water agreed upon, he had no cause of action nor claim against the defendant.

The reply consisted of a general denial, with an admission of the allegations of the answer as to the price to be paid for sinking the well. A jury trial was had which resulted in a verdict and judgment in favor of defendant in error, who was plaintiff below, for the sum of sixty-five dollars. A motion for a new trial was filed, based upon the following grounds:

"First—There is error in the assessment of the amount of the recovery, in this: the action is brought to recover the sum of eighty-four dollars and interest thereon at seven per cent from June first, 1886, whereas the verdict is for \$65.

"Second—The amount of recovery is excessive, appearing to have been given under the influence of passion and prejudice.

"Third—The verdict is not sustained by sufficient evidence.

"Fourth—The verdict is contrary to law.

"Fifth—The verdict is contrary to the third instruction of the court given on his own motion.

"Sixth—The verdict is contrary to the second, fifth, sixth, and seventh, instructions of the court, given on his own motion.

"Seventh—The court erred in giving the instruction asked for by the plaintiff, and duly excepted to.

"Eighth—The court erred in giving the ninth instruction on his own motion, and duly excepted."

This motion being overruled, plaintiff in error presents the case to this court by proceedings in error. It is con-

tended by plaintiff in error that if defendant in error were entitled to recover at all, it must be upon the grounds that there was no warranty of the well, and in that event he would be entitled to the sum of \$84, and no less; that the verdict being only for \$65, the jury must have found on the theory of plaintiff in error that there was a warranty, and assessed the recovery as directed by one of the instructions given on the request of plaintiff, and which instruction it is contended was erroneous. The instruction is as follows:

"You are instructed that if from the evidence you find that the plaintiff, Samuel T. Bowman, warranted the well in question to furnish twenty barrels of water per day, and that the well failed to supply that amount, and if you further find that plaintiff did not expressly agree that if the well did not supply twenty barrels per day he would charge nothing therefor, and also find that the well, as shown by plaintiff, was of any value whatever, then and in that case the amount of plaintiff's recovery should be the contract price less the amount it would cost to complete said well and make it supply the amount of water provided for in the warranty, provided it could be made to comply with the terms of the warranty."

The principal objection to this instruction is that it was not applicable to any of the evidence in the case. To this we cannot agree. There was quite a conflict in the testimony upon the question of the warranty. Plaintiff in error in his testimony says that it was agreed that in case the well did not furnish twenty barrels of water, it should not be paid for; while upon the other hand, defendant in error insisted, and by other evidence as well as his own sought to prove, that while it was partially agreed that the well should furnish twenty barrels of water, yet the defect or failure was caused by the kind of tubing which was furnished by defendant in error; that while he virtually agreed to sink a well which would yield twenty barrels of

water per day, it was not understood that the tubing furnished by defendant in error should be used, and an effort was made which was partially successful, perhaps, to show that the whole cause of the failure was in the quality or character of the tubing furnished by plaintiff in error, and which he insisted should go into the well, even to the extent of saying that he would take upon himself all the chances, and all risks of a failure resulting from the quality of the tubing used. Taking the whole case together, we do not think the giving of the instruction was erroneous.

In the course of the instructions given by the court on its own motion, the jury were told that the burden of proof on the question of warranty was on plaintiff in error. It is claimed that in this the court erred, as the answer consisted in part of a general denial, and nowhere admitted any of the allegations of the petition; that the defendant assumes the burden of proof only when he answers in confession and avoidance. Without stopping to examine as to the correctness of the rule contended for, it must be sufficient to say that in substance the answer did admit the allegation of the petition so far as the sinking of the well and the price to be paid therefor was concerned, but sought to attach to them the condition of warranty as an avoidance of any indebtedness therefor. This being true, the defendant in the action would have to assume the burden as to the defense so pleaded. In so instructing the jury the court did not err.

Upon an examination of the whole case, we find that the jury were properly and fully instructed upon every point involved, and that while we may not be able to account for the verdict upon the most logical basis furnished by the evidence, yet there is a basis furnished thereby for a verdict of \$65 instead of \$84, as claimed by defendant in error. But of this, plaintiff in error could not complain. If we assume that the jury found either that there was no warranty, or that if there were such warranty it was

 Wilcox v. Brown.

avoided by the kind of tubing furnished by plaintiff in error, and which there was some evidence to show was so furnished in opposition to the advice of defendant in error, this would be sufficient to sustain the verdict.

We see no error which would call for a reversal of the judgment. It is therefore affirmed.

JUDGMENT AFFIRMED.

THE other Judges concur.

MARY E. WILCOX, PLAINTIFF IN ERROR, V. CHARLES
H. BROWN ET AL., DEFENDANTS IN ERROR.

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[FILED JUNE 13, 1889.]

Conversion: REPLEVIN. A instituted an action in replevin against B for the possession of certain personal property. The order of replevin was placed in the hands of C, the sheriff, for execution, by virtue of which he seized the property. A executed and delivered to C a replevin bond, with sureties which were approved by him; but the property was left in the care of C to the extent that it was not delivered manually to A. A and B then settled the matter in controversy between them. D, the person from whom B had received title to the property by bill of sale, executed another bill of sale to E, and C, by direction of A, delivered the property to E without B's knowledge or consent. In an action by B against C for the value of the property replevied, it was held, that C was liable, and that neither the execution of the replevin bond nor the direction of A to him to deliver the property to E, would constitute a legal excuse relieving him from such liability.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

C. C. Flansburg, and John Dawson, for plaintiff in error, cited: *Bobb v. Woodward*, 50 Mo. 95; *Gregory v.*

Whedon, 8 Neb. 373; *Tremper v. Barton*, 18 Ohio, 418; *Brown v. Webb*, 20 Id. 389; *Hunt v. Robinson*, 11 Cal. 262; *Hagan v. Lucas*, 10 Peters, 404; *Bank v. Dunn*, 97 N. Y. 149; *Lockwood v. Perry*, 9 Metcalf, (Mass.) 440.

T. Judson Ferguson, and *B. C. Oyler*, for defendant in error, cited: *Fleming v. Wells*, 4 Pac. Rep. (Cal.) 197.

REESE, CH. J.

This action was instituted in the district court of Harlan county against defendant in error, who was sheriff of that county, upon his official bond, for the purpose of recovering the value of certain goods which it was claimed he unlawfully detained from plaintiff. A trial was had in the district court, which resulted in favor of defendant in error, when the cause was removed to this court, and upon review was reversed and a new trial awarded. The report of the case may be found in 20 Neb., at page 355. After the cause was remanded, a second trial was had, which resulted the same as the first, in favor of the defendant in error, the sheriff. It appears from the evidence that on the 20th day of August, 1885, one Canna Willis, who was the owner of the goods, transferred them to plaintiff in error by bill of sale, which is set out in the record. On the 24th day of August, 1885, Lockwood, Englehart & Co., caused to be issued out of the office of A. A. Brown, a justice of the peace of Harlan county, a writ of replevin for the possession of the goods in question, which writ was delivered to defendant in error, as sheriff, for execution. The goods were levied upon, appraised, and the proper return made to the justice of the peace, showing that fact. It is claimed by plaintiff in error that the goods remained in the possession of the sheriff during the whole of the time until he delivered them to Mrs. Verbryck, who retained possession of them. Within a few days after the

institution of the replevin proceedings by Lockwood, Englehart & Company against plaintiff in error, a settlement was made between them, when it was agreed that the property should be returned to Mrs. Wilcox, plaintiff in error. After the goods had been taken from Mrs. Wilcox by the sheriff, Canna Willis and Maggie Willis executed a bill of sale by which they sought to convey them to Mrs. Verbryck, and upon the strength of this bill of sale the delivery was made to her by the sheriff. We think there is no conflict in the testimony, but that the sheriff had the property in his possession all the time until his delivery to Mrs. Verbryck, although he denies such possession and alleges that he held them only as agent of Lockwood, Englehart & Company, and delivered them to Mrs. Verbryck, upon their order after the settlement was made. It is conceded that the property was delivered to Mrs. Verbryck, but the sheriff contends that he was ordered so to do by the attorneys of Lockwood, Englehart & Company, who had executed their replevin bond to him and by which they became entitled to control the property. Upon the second trial the court gave the jury the following instructions upon the request of plaintiff in error :

"First—If you find from the evidence that Canna Willis had given an absolute bill of sale to the plaintiff, and that afterwards she made a bill of sale of said goods to Catharine Verbryck, then the first bill of sale would convey all the title to said goods to plaintiff, and the second bill of sale would convey no interest in said goods.

"Second—The fact that Dawson and Cordeal were attorneys for Lockwood, Englehart & Company would not authorize them to sell the goods ; and the fact that Lockwood, Englehart & Company had replevied the goods would not authorize Lockwood, Englehart & Company to sell the same ; and an attempted sale of them would confer no title to the property.

"Third—If you find that Lockwood, Englehart & Com-

pany accepted a note of Catharine Verbryck and Maggie Willis in full settlement of their claim, and after the acceptance of said note, said Lockwood, Englehart & Company would have no further interest in said goods; and neither they nor their attorneys could transfer interest in them.

"*Fourth*—The jury are instructed that if they find the suit between Lockwood, Englehart & Company and Mary E. Wilcox was discontinued by agreement, then upon the discontinuance and settlement of said suit, the plaintiff Mary E. Wilcox would be entitled to the immediate possession of said property."

Defendant in error then requested the court to give to the jury the following instruction, which was given, and to the giving of which plaintiff in error duly excepted:

"If the jury find from the evidence that on the 24th or 25th day of August, 1885, and within twenty-four hours after the seizure of the property under the writ of replevin, in Lockwood, Englehart & Company against Wilcox, the sheriff took and approved the undertaking in replevin of Lockwood, Englehart & Company, and thereupon turned the property over to Lockwood, Englehart & Company, or their agent, then you should find for the defendant, and it is not necessary that such turning over of the property should be by actual delivery; but any thing which clearly shows a surrender of control by defendant Brown over the property in favor of Lockwood, Englehart & Company, and an assumption of control over them by them or by their agents, is sufficient."

The trial having resulted in favor of the sheriff, plaintiff in error brings the cause to this court for review, and assigns for error among other things the following: the verdict was not sustained by sufficient evidence; the court erred in giving the instruction last above referred to.

After a careful examination of the bill of exceptions, we are led to the conclusion that the verdict was against the evidence, and was not sustained thereby.

The bill of exceptions shows the following state of facts: Originally the goods involved were transferred to plaintiff in error, by Canna Willis. Lockwood, Englehart & Company then brought their action of replevin against plaintiff in error for possession of the goods. They were levied upon and taken by defendant in error into his possession. The action between Lockwood, Englehart & Company and plaintiff in error was then settled, and about the same time another bill of sale was made by Canna Willis and Maggie Willis to Mrs. Verbryck. While it is true perhaps that the goods were under the control of Lockwood, Englehart & Company, yet it was clearly shown that they were never taken out of the actual possession of the sheriff, and that he had charge of them during the whole time. Upon a settlement being made between Lockwood, Englehart & Company and plaintiff in error, the attorneys for Lockwood, Englehart & Company directed the sheriff to deliver the goods to Mrs. Verbryck. The sheriff did so, ordering a drayman to go to where they were stored and take them and deliver them to her, which was done. After the settlement between Lockwood, Englehart & Company and plaintiff in error had been made, neither Lockwood, Englehart & Company, nor their attorneys, had any further control over the goods. Their direction to the sheriff to deliver them to a third party was no more than the direction of any other person would have been. As said by Judge MAXWELL in a former opinion in this case, page 361: "If defendant Brown, therefore, was in possession of the goods in question when the parties amicably settled the matter in controversy, he should have returned such goods to the party from whom they were taken."

Adopting this view of the case, we are led to the conclusion that the instructions above quoted, asked for by plaintiff in error, and given to the jury, were correct, while the instruction, given as asked by defendant in error, was incorrect, and should not have been given. By it the jury

were told in substance that if the sheriff approved the undertaking in the replevin suit of Lockwood, Englehart & Company against plaintiff in error, and turned the property over to Lockwood, Englehart & Company, or their agent, the jury should find for the defendant. There was no proof of any turning over of the property. It remained in the possession of the sheriff from the beginning until he had it delivered to Mrs. Verbryck. In our view of the case, it is wholly immaterial whether a replevin bond was taken by the sheriff or not. The question to be decided by the jury was: Did he have the property in his possession at the time of the settlement? Or, rather, Had he taken the property into his possession by virtue of the writ of replevin? If he had, it was his duty to retain possession of it until the replevin bond was executed and delivered to him, when he should have delivered it to Lockwood, Englehart & Company; but whether he did so or not is wholly immaterial, so far as this case is concerned. There is no doubt but that he wrongfully delivered the property to Mrs. Verbryck. It will not do for him to say that he is excused from the liability created by his acts by reason of the fact that he was an agent for Lockwood, Englehart & Company, or that he was directed to do so by them, or by their attorneys; for they had no possible authority or right to direct him to return the property to any one other than the person from whom it was taken. Therefore, if he did deliver the property to Mrs. Verbryck when he should have delivered it to plaintiff in error, he would be liable to plaintiff in error for its value; and the fact that some other individual, without any right or authority so to do, directed him to deliver them to a third party, would be no excuse or justification for him.

We are satisfied that the verdict of the jury was not sustained by the evidence in the case. We are also satisfied that the instructions given upon the request of defendant in error should not have been given; and for these rea-

sons the judgment of the district court must be reversed and the cause remanded for further proceedings according to law, which is done.

REVERSED AND REMANDED.

THE other Judges concur.

THE STATE OF NEBRASKA, EX REL. WILBUR F. BRYANT,
V. EPHRAIM LAUVER, COUNTY JUDGE OF CEDAR
COUNTY.

[FILED JUNE 13, 1889.]

1. **Criminal Law: WARRANT.** A complaint in writing signed by the complainant and sworn to before the clerk of the district court within his jurisdiction and filed in the office of the justice of the peace, would be sufficient to require him to issue a warrant thereon.
2. ———: **INFORMATION.** Where a criminal statute is descriptive of the offense which is declared to be a crime, an information or complaint filed before a justice of the peace, the charging part of which is in the language of the statute, will be *held*, sufficient.
3. **Constitutional Law:** Section 28 of chapter 61, Laws of 1881, commonly known as the Slocumb law, *held*, constitutional so far as this case is concerned, without a discussion of the question.

Original application for mandamus.

Wilbur F. Bryant, for relator.

Ephraim Lauver, for respondent.

REESE, CH. J.

This is an application to this court in the exercise of its original jurisdiction for a peremptory writ of mandamus to

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the defendant, who is the county judge of Cedar county, requiring him to issue a warrant upon a complaint filed before him charging one Andrew Anderson with the crime of having been found in a state of intoxication. We quote the following from the transcript of the county judge:

"The State of Nebraska against Andrew Anderson.

"Be it remembered that on the 26th day of November, 1888, the following complaint was filed in the office of the county judge of Cedar county, Nebraska, to wit:

"THE STATE OF NEBRASKA, CEDAR COUNTY: SS.

"Before me, E. Lauver, county judge in and for Cedar county, personally appeared Wilbur F. Bryant, who, being duly sworn as hereinafter certified, says that Andrew Anderson, late of the county aforesaid, on the 23d day of November, in the year of our Lord one thousand eight hundred and eighty-eight, in the county of Cedar, and state of Nebraska, aforesaid, was found unlawfully in a state of intoxication contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska.

WILBUR F. BRYANT.

"Subscribed in my presence and sworn to before me this 26th day of November, 1888.

"[SEAL.]

FRANZ NELSON,

"Clerk District Court."

"Thereupon the said Wilbur F. Bryant tendered the lawful fee, and demanded that a warrant be issued for the arrest of the said Andrew Anderson. Though I have reasonable grounds to believe that the facts set forth in the foregoing complaint were true, yet I refused to issue the warrant as requested, for the following reasons, to wit: *First*, that the complaint was not sworn to before the proper officer; *second*, that the complaint does not charge any person with any offense against the laws of the state.

"E. LAUVER, County Judge."

The answer consists, first, of a general denial of the allegations of the petition; second, a specific denial of the truth of the allegation that the relator is a citizen of the United States, or of the state of Nebraska. It is alleged that the relator himself was born in the United States, to wit, in the state of New Hampshire, but that his ancestors were born in Ireland, and were not citizens of the United States; and it is alleged that relator's father had been a soldier in the United States army. From the whole tenor of the answer in this particular, it is apparent that the denial of the citizenship of the relator is not relied upon by respondent; neither could it be successfully.

By the docket of the county judge it appears that he refused to issue a warrant upon two grounds: First, that the complaint was not sworn to before the proper officer. There is no force in this objection. Section 1 of chapter 62 of the Compiled Statutes provides that: "Oaths and affirmations may be administered in all cases whatsoever by judges of the supreme court, judges of the district court, clerk of the supreme court, clerks of the district courts within their respective districts, and by probate judges, justices of the peace, and notaries public, within their respective counties."

Sec. 286 of the Criminal Code provides that: "Whenever a complaint in writing and upon oath signed by the complainant shall be filed with the magistrate charging any person with the commission of an offense against the laws of this state, it shall be the duty of such magistrate to issue a warrant for the arrest of the person accused, if he shall have reasonable grounds to believe that the offense charged has been committed."

The complaint was properly sworn to, and complied with all the requirements of the section above quoted. This holding does not in any degree contravene the ruling of this court in *Richards v. The State*, 22 Neb. 145. In that case an information was filed in the district court by

the prosecuting attorney, and sworn to before a notary public. In discussing the validity of the information, Chief Justice MAXWELL, in writing the opinion of the court, at page 150, says: "The information was sworn to on information and belief before a notary public. In order to authorize the filing of an information, except in case of fugitives from justice, there must have been a previous examination based on an accusation under oath, charging the party with the commission of the crime. An information sworn to by the prosecuting attorney upon information and belief is sufficient; but the oath must be taken before a judicial officer one authorized to administer the oath. At common law such oath was taken before a magistrate, (1 Chitty Criminal Law, 26,) and the common law on that point prevails in this state. A notary public is an officer of the civil and commercial laws, and is unknown to the criminal law, and the oath is unauthorized."

The clerk of the district court fills all the requirements of the officer referred to in the opinion in the above case. We have no doubt but that the complaint was properly sworn to.

The second objection to the complaint, as shown by the transcript of the county judge, was that it did not charge any person with an offense against the laws of the state. Upon an examination of the complaint, we find that it substantially complies with the provisions of the section making drunkenness a crime, the section being descriptive of the offense.

No brief has been filed by the defendant. It is said in the brief filed by the relator that the refusal of the county judge to issue a warrant was upon the ground that the statute which imposes a penalty for being found in a state of intoxication, is unconstitutional. Whether or not such objection was made by respondent we have no means of knowing, from the record proper. The section under which the complaint was filed is section 28 of chapter 61 of the laws

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enacted in 1881, being found on page 270 of the laws of that session, and is what is known in this state as the Slocumb law. Quite an able brief has been filed by relator, the purpose of which chiefly is to show that the section referred to is within the title of the act, and therefore constitutional. While we have no doubt of the constitutionality of the section, yet we do not feel inclined to discuss the question in this case, as it might be said that it was done upon an *ex parte* hearing. So far as this petition is concerned we shall treat the law as constitutional.

A peremptory writ of mandamus will be awarded as prayed for in this petition.

WRIT ALLOWED.

THE other Judges concur.

THE STATE OF NEBRASKA, EX REL. AMANDA J. NELSON, V. JOHN HARPER.

[FILED JUNE 13, 1889.]

1. **Taxes: DRED: MANDAMUS.** In an application for a mandamus to compel the county treasurer to execute to the relator, who was the holder of a certificate of purchase at the tax sale, a tax deed, it was shown that the land had been redeemed subsequent to the sale; but there was no proof that the person paying the redemption money had authority from the person in whose name the payment was made. It was *held*, that there was a presumption that the necessary authority was shown to the treasurer to entitle him to receive the money, the acts of public officers being presumed to be regular.
2. ———: ———: **REDEMPTION.** In making such redemption, the amount paid was the taxes with accrued interest; but nothing was paid as printers' fees, under the provisions of sections 123 and 125 of the revenue law of this state. It was not shown upon the trial that any proof had been left with the treasurer

of the amount actually paid for the publication of the notice required by said sections, and that the failure to pay the printers' fee would not avoid the redemption.

ORIGINAL application for mandamus.

Geo. P. Sheesley, for relator.

Matt Miller, for respondent.

REESE, CH. J.

This is an application to this court in the exercise of its original jurisdiction for a peremptory writ of mandamus to the county treasurer of Butler county to compel him to execute and deliver to Amanda J. Nelson, a treasurer's tax deed conveying to her the east half of the southeast quarter of section seven, in township sixteen north, of range three in Butler county.

It appears from the record that this land was sold to P. J. Garfield on the 19th day of August, 1884 by John Harper, the county treasurer, for the delinquent taxes for the years 1876 and 1882; and that by *mesne* assignments the certificates of sale had been transferred to the relator. The petition contains all the averments necessary to entitle the relator to the writ, and need not be further noticed, except as to certain allegations, which are in substance that the respondent refused to execute and deliver the treasurer's deed, and gave as a reason for such refusal that the land had been redeemed from the said tax sale by one S. H. Mallory, in whose name the land was taxed, and whose title to the said land was a treasurer's deed, issued to him on a date not given, but which was prior to the expiration of the time in which to redeem from relator's certificate. But it was alleged that the redemption was made by one A. J. Cook, on the 31st day of July, 1886; that on that day he appeared at the office of the county treasurer

and paid to such treasurer, for the purpose of redeeming the land, the sum of \$66.70, in the name of S. H. Mallory, and for that purpose alone; that the amount so paid was the amount of taxes, together with lawful interest, as paid by the said P. J. Garfield at the time of the purchase, and for taxes thereafter accruing; and that the treasurer at that time entered upon his proper books in his office the usual statements of redemption, and in the name of S. H. Mallory. It is alleged that at the time of the redemption, J. A. Cook did not show himself to the defendant to be the owner or occupant of the land, or in possession thereof, nor to be the authorized agent of the owner, or of any one occupying or in possession of the same, or in any way entitled to redeem it; that in fact he was not the agent of Mallory for the purpose of redeeming said land, and had no lawful authority so to do. The usual averments of demand on the part of the relator are made. Neither the county treasurer nor S. H. Mallory have answered, but an answer has been filed by the said Cook, in which substantially all the averments of the petition have been admitted, so far as the sale of the real estate is concerned; but alleging at that the time he made the redemption, he was the agent of Mallory, and at that time presented to the county treasurer his authority to do so. It is not deemed necessary to set out in this opinion any of the evidence which has been introduced to sustain the relator's demand. There are but two questions involved: First, had Cook authority to make the redemption for Mallory at the time he did; and second, was his failure to pay to the county treasurer the amount due relator for advertising the land under the provisions of section 125 of the revenue act, fatal to his redemption? It is conceded that he did not pay the expenses of such notice.

Upon the first question there is substantially no proof; and were it not for the legal presumptions which exist in favor of the regularity of the proceedings of officers

in the discharge of their official duties, we would be left substantially to conjecture upon this point; or, perhaps, the relator would be entitled to her writ. The treasurer was called as a witness and when interrogated as to the exhibition of any authority by Cook at the time he made the redemption, the witness stated that he did not remember whether any such authority was exhibited or not. The attorney for relator testified that he was in the county treasurer's office on the day the redemption was made by Cook, and that in a conversation with him in the presence of the treasurer, Cook did not claim to have any authority from Mallory to make the redemption, and no authority was at that time shown by him. But it was shown by this witness that the redemption was not made at that time; that the witness, and perhaps Cook, both, left the office of the county treasurer and went to their homes or places of business; and that at another time on that same day Cook appeared in the office of the treasurer and made the redemption, by paying the money which he did pay. In the absence of proof to the contrary, we must hold that the presumptions are that the proper showing was made to the county treasurer before he permitted Cook to redeem; and therefore it will be presumed that he had authority to pay the money to the county treasurer. This claim on the part of relator therefore cannot avail her.

It appears by the pleadings that the amount of money paid by Cook was the amount of taxes paid at the time of the sale, and the taxes which thereafter accrued, with their lawful interest. He did not pay any printers' fee allowed under section 125, art. 1, of the revenue law. It sufficiently appears that at the time the redemption was made, something was said about this fee. We here quote the section referred to. It is as follows:

"Sec. 125. In case any person shall be compelled to publish such notice in a newspaper, then before any person who may have a right to redeem such lands or lots from

such sale shall be permitted to redeem, he shall pay the officer or person who by law is authorized to receive such redemption money, the amount paid for printers' fee, for publishing such notice, for the use of the person compelled to publish such notice as aforesaid. The fee for such publication shall not exceed \$1 for each tract or lot contained in such notice."

It will be seen by this section that before a redemption can be made, the person desiring to redeem shall pay the officer or person who by law is authorized to receive such redemption money, the amount *paid* for printers' fees for publishing such notice, for the use of the person so compelled to publish the notice, and which fee shall not exceed \$1 for each tract or lot contained in the notice.

By this section it is apparent that no fee is absolutely fixed by law. The amount of money to be paid must be equivalent to the amount actually paid for publishing the notice. Now, how will the county treasurer, or the person seeking to redeem, know the exact amount paid by the holder of the certificate unless some evidence of that fact is left with the county treasurer immediately after the payment is made, or at any rate before the redemption is made? Section 123 requires the notice to be given before the deed can be executed, and section 125 is only a limitation upon the amount which the owner of the lot or land shall be compelled to pay in addition to other money as a condition precedent to the redemption. (*Swan v. Huse & Son*, 15 Neb. 465.) While the holder of the certificate is entitled to be recompensed for the amount paid to the printer, he can only recover that amount, which cannot exceed \$1. We hold, therefore, that before the county treasurer can lawfully require of any person the payment of this money, some proof must be left with him by the person who actually paid it, of the amount so paid, in order that he may collect the same. The failure therefore to pay the expenses of the publication on the part of the person making the

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redemption, under the circumstances named, would not avoid the redemption. It is beyond question that the actual amount of taxes paid by the relator and her grantors or assignors, with the lawful interest thereon, have been paid to the treasurer for her benefit; and as we have seen, the presumption is they were paid by the person having the right so to do.

The writ must therefore be denied.

WRIT DENIED.

THE other Judges concur.

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- Estoppel.** See IMPROVEMENTS, 2. JUDGMENT, 3. MORTGAGE, R. E., 4.
1. In case stated, *held*, that plaintiff as agent of his father, and part owner of premises in question, was estopped to deny certain statements, whether true or false, made to defendant, whereby latter was induced to purchase premises. *Wise v. Newatney*..... 110, 116
 2. In action by a national bank upon promissory notes, where defense of usury is set up, costs taxed to plaintiff, and credits allowed defendant, latter is estopped to deny the validity of the judgment, and the action is a bar to recovery under provisions of the federal statute. *Bollong v. Schuyler National Bank*..... 288, 287
- Evidence.** See HUSBAND AND WIFE. PARTNERSHIP. BREACH OF PROMISE. DEPOSITIONS, 1. MURDER.
1. Under the issues as formed by the pleadings, *held*, sufficient to sustain the verdict. *Downing v. Glenn*..... 325
 2. From the written exhibits used, *held*, that a jury would be justified in finding that defendants did not act in good faith, and were liable. *Cleveland Stove Co. v. Hovey*..... 628
 3. Proof of what an agent, who sells goods subject to approval of principal, said or did in relation to such goods after or-

- der has been filed, inadmissible against principal, without proof of authority to bind him. *Id.*..... 629
4. Testimony of a witness as to words spoken to him through an interpreter, *held*, unobjectionable as hearsay evidence. *Wise v. Newatney*..... 112
5. Where defendant prayed as alternative relief that he might be subrogated to rights of his grantor, who held the land in controversy under a tax title, *held*, that admission of tax deed and tax receipts, to establish amount of alternative recovery, was no error. *Id.*..... 117
6. Account books admissible only when containing charges by one party against the other, and then only as provided by statute. *Gilbert v. Saddlery Co.*..... 212
7. Where plaintiff testified that the account sued on was copied from books of original entry, afterward destroyed, *held*, that failure to preserve and produce such books was ground of suspicion. *Brown v. Smith*..... 378
8. Under section 346 of the Code, books of account otherwise unobjectionable, may be introduced in evidence, without calling the party who made the entries to prove them, where sufficient reason is given for not doing so *Volker v. First National Bank*..... 605
9. Too late to object that party making entries was not called to prove them, after books are identified, and items and entries therein of adverse party's account, given in evidence without objection. *Id.*..... 606
10. Record of former trial of same case between same parties, admissible. *Filley v. Billings*..... 549
11. To avail himself of error in rejection of, party must have offered testimony, clearly presenting what he expected to prove. *Id.*..... 548
12. In an action by a vendor of certain cattle and hogs, against purchaser, for falsely weighing the same, where it appeared that the stock weighed more on one end of defendant's scales than on the other; that defendant would not consent to a reweighing elsewhere; and that no scales of acknowledged accuracy were accessible: *Held*, That the opinion of witnesses of long experience in the stock business was admissible in evidence to establish the true weight. *Id.*..... 547
13. Hypothetical questions asked of an expert in regard to the insanity of an accused, must be so framed as to fairly reflect the facts admitted or proved by other witnesses. *Burgo v. State*..... 642
14. Witness need not be an expert in the matter of the speed

- of trains in order to testify as to the rate of speed at which a train was running at the time of an accident. *C. B. & Q. R. R. Co. v. Clark*.....650, 651
15. In an action for damages for injuries to employe of contractor resulting from carelessness of those operating a construction train, evidence admissible to show unsafe condition of track where accident occurred. *Id.*..... 652
 16. Papers and letters offered in, pertinent to the issue, should be admitted; and court will not take notice, nor form collateral issue, to determine how they were obtained. *Sanford v. Sornborger*..... 304
 17. When incompetent, but tending to prove the case of the side offering it, and admitted without objection, incompetency will not be considered an error on appeal. *M. P. R. E. Co. v. Vandevanter*..... 235
 18. A deed absolute in its terms, may be shown by parol to have been given to secure the payment of money, and, as between the parties, will be construed to be a mortgage only. *Tower v. Fetz*.....713, 714, 715
 19. The claim that note and mortgage sued on were, by draftsman's error, so executed as to represent a sum one thousand dollars in excess of that actually agreed upon and intended, *held*, to be supported by the overwhelming weight of evidence. *Reid v. Colby*..... 511
 20. Statements of grantor of personal property, who was heavily indebted, made soon after transfer, in derogation of *bona fides* thereof on his part, proper to be proven to show fraud on part of grantor, but not on part of grantee, in contest between latter and creditors of grantor, over the property. *Sloan v. Coburn*..... 610
 21. In an action against a national bank to recover penalty allowed by federal statute for taking usurious interest, the testimony of plaintiff, the principal witness relied upon, was vague, indefinite, and unsatisfactory. *Held*, That the court could not review the findings of fact of the jury. *Volker v. First National Bank*.....604, 607
 22. In an action upon a guaranty, which, defendants alleged, was given as the consideration of a contract of separation between husband and wife, and non-interference by latter, which contract was broken, *held*, that the court erred in not admitting evidence tending to prove the allegations of the answer. *Southard v. Bryant*..... 256
 23. Where defendant, on a trial under bastardy act, denied that he had sexual intercourse with complaining witness

- on a day named in her testimony, any question relating to the situation of the parties while together on that day or about that time, was proper cross-examination; and a denial of sexual intercourse on the day named, was not a denial that the same had taken place. *Planck v. Bishop*.... 592
24. Under a general denial in an answer, not reversible error to admit testimony by plaintiff tending to show a settlement of some, and by defendant (without objection) of all matters in controversy. *Welton v. De Yarman*..... 62
25. In an action against a party for conversion of wood, testimony tending to show that wood was procured from third party, *held*, not erroneous, but corroborative of defendant's denial. *Id*..... 63
26. Where, by the testimony, doubt is cast upon the validity of a contract for the purchase of grain, it devolves upon those claiming rights under it, to show that the contract is *bona fide* and made with the intention of future delivery. *Sprague v. Warren*..... 336
27. Where commission merchant testified that he never had a warehouse receipt for grain, which he claimed to have purchased on the order of others; that he did not know in what elevator the alleged grain was; and that he settled the alleged losses by "ringing up" in the board of trade: *Held*, That testimony failed to show a *bona fide* purchase. *Id*.....334, 335
28. Where a stock of goods was exchanged for an opera house on March 22, to date from March 1 of same year, and defendant testified that he was to retain the receipts from sales between those dates, *held*, that an instruction in effect withdrawing such testimony from the jury, was erroneous. *Jenae v. Gilbert*..... 462
29. In such case where fraudulent representations were alleged to have been made as to the value of the goods, testimony tending to show that after the exchange, plaintiff remained as business manager, with defendant's son as clerk, and that no complaint was made against plaintiff, should have been submitted to the jury. *Id*..... 463
30. Where petition alleged that price of mechanical work and labor was agreed to by plaintiff in view of erecting a two-story building, and that afterwards he was required to and did erect a three-story building at an additional and disproportionate cost, proper on part of trial court to admit testimony showing circumstances of execution of contract, and facts relating to parties, and to building as well as to

others of the group of buildings of which it formed part.
Doane College v. Lanham..... 446

31. In an action by a married woman upon a promissory note, where defendant answered admitting execution of note but denying plaintiff's ownership or that note was executed to her, but alleging that it was made to her husband, without consideration, and the husband testified that the note was executed and delivered to his wife personally, and that he had never owned it: proper to ask him, on cross-examination, if he had not, at a certain time and place, had the note in his possession, and offered to trade it, saying that it belonged to him. *Galloway v. Hicks*..... 534
32. In a proceeding to recover for damages to land caused by the overflow of water on account of the erection of a mill-dam, not necessary to negative the existence of other property so impaired, or of other parties entitled to damages, nor to establish any fact necessary or advantageous to the owner of such mill-dam in a proceeding for leave to build or continue the same. *Pierce Mill Co. v. Koltermann*..... 726
33. Where upon examination in chief of a defendant, the answer to a question asked him is excluded upon plaintiff's objection, a reviewing court will not inquire whether trial court erred in so doing, if it appears that witness was afterwards interrogated and testified fully. *Musselman v. Barker*..... 744

Exceptions. See DEPOSITIONS, 2.

Must be made to ruling of district court refusing to give an instruction in order to justify supreme court in reviewing it. *C. B. & Q. R. Co. v. Starmer*..... 634

Execution.

1. Clerk of district court may issue, on receipt of mandate showing simple affirmance of judgment in supreme court. *State, ex rel. Noble, v. Sheldon*..... 153
2. Failure of sheriff to sell property levied upon under, *held*, upon facts proved, not to render sheriff liable. *Burton v. Cave*..... 188

Exemptions. See ATTACHMENTS, 5.

Wife entitled to, as head of family, where property levied upon consisted of household goods, and by the departure of the husband, temporarily or permanently, the support of the family devolved upon the wife. *Hamilton v. Fleming*. 245

Expert Evidence. See EVIDENCE, 12-14.

Forcible Entry and Detainer.

In an action of, under facts stated, *held*, that while justice of

peace or county judge could not grant affirmative relief, yet could receive proof of mistake to show that defendant was not wrongfully in possession. *Lloyd v. Reynolds*..... 68

Foreclosure. See MORTGAGE.

Fraud. See EVIDENCE, 20. WEIGHTS AND MEASURES.

Fraudulent Conveyances. See HUSBAND AND WIFE. GIFT.

Where an insolvent father conveyed land to his daughter for an alleged consideration stated in deed, *held*, that it devolved upon the latter to prove actual consideration paid and that she was a purchaser in good faith. *Plummer v. Rummel*..... 147

Fraudulent Representations. See SET-OFF AND COUNTER CLAIM.

When alleged to have been made as to the value of a stock of goods, court should have instructed jury as to the difference between representations of actual value and mere expressions of opinion. *Jenne v. Gilbert*..... 463

Gaming. See WAGERING CONTRACT.

General Denial. See EVIDENCE, 24.

1. Under a general denial in an answer, testimony of parties tending to show settlement, not erroneous, but answer should be amended to conform to proof. *Welton v. De Yarman*..... 62
2. Under a general denial, in an action for conversion of wood, testimony of defendant that wood was procured from third party, *held*, not erroneous but corroborative of denial. *Id.*..... 63
3. Under a general denial in an answer, nothing can be given in evidence not tending to prove or disprove facts stated in petition.
Id...... 59
Jones v. Fruin..... 67

Gift.

A wife and mother made a gift to her son, then about twenty-one years old, of a valuable horse, which was afterwards attached for the debts of the father, and thereupon replevied by the son. The uncontradicted testimony of the husband being to the effect that the money paid for the horse was earned by her, and not obtained from the father, *held*, that a judgment in favor of the son was supported by the weight of evidence. *Callender v. Horner*.....688, 689

Guaranty. See PARTNERSHIP, 2.

1. In an action upon, where defendants set up that guaranty was given as the consideration of a contract of separation between husband and wife, and non-interference by latter which contract was violated, *held*, that the court erred in not admitting evidence tending to sustain the allegations of the answer. *Southard v. Bryant*..... 256
2. During the absence of W., S. engaged K. to remove a building belonging to W. from the lot of one who had threatened to tear it down, and represented that he was acting for W., who was able to pay, but that if he did not, S. would see that K. was paid. *Held*, That S. was liable, upon failure of K. to obtain satisfaction for his labor from W. *Sholes v. Kreamer*..... 561

Guardian and Ward.

In an action by guardian of a person alleged to be insane, to cancel a deed of conveyance of real estate, the court below found that there was a failure to prove insanity and that the conveyance was valid. *Held*, That the finding and judgment were sustained by the proof. *DeWitt v. Mat-tison*..... 659

Head of Family.

Wife is, where support of family devolves upon her by departure, temporarily or permanently, of husband. *Ham-ilton v. Fleming*..... 245

Hearsay Evidence. See EVIDENCE, 4.**Homestead.**

1. Mortgage upon, signed by husband or wife alone, void. *McCreery v. Schaffer*..... 178
2. Where husband and wife mortgage land which includes homestead, and husband subsequently mortgages part not exempt, and first mortgagee forecloses, making second mortgagees and judgment creditors parties, latter cannot insist that homestead be sold. *Id*..... 180

Husband and Wife. See GIFT. HEAD OF FAMILY.

1. In an action against a wife, to recover for meat used in keeping a restaurant, the testimony showed that the restaurant had been purchased by the husband and carried on in his name, and that the account was charged in the surname of the husband and wife. *Held*, That a verdict in effect that the wife was not liable, was supported by the clear weight of evidence. *Jeffrey v. Fleming*..... 686
2. In an action for ladies' furnishing goods, where it was sought to charge the wife's separate estate, and plaintiff

testified that the account sued on was copied from books of original entry, which had been destroyed, *held*, that failure to produce such books was ground of suspicion. *Brown v. Smith*..... 378

3. Where a mortgage was executed by, on land, and also on chattels, to secure debts owed by the husband to a third party, who foreclosed the chattel mortgage, purchased the property, and after satisfying his own claims, delivered the surplus to the wife, *held*, that, in the absence of fraud, though the property had been assessed in the husband's name, and even if he had paid taxes thereon, the wife took a good title as against the husband's attaching creditors. *Callender v. Horner*.....692, 693
4. Where in an action to subject to payment of husband's debts, certain land which wife claimed to own, both testified that at marriage wife had some private means which she always intended to hold, and which was invested in land in question, though purchase was, by mistake, made in husband's name, and that a hotel built on the land with borrowed money was managed by her alone, *held*, that while testimony was somewhat contradictory, decree in favor of wife would not be molested. *Wood v. O'Hanlan*.. 529

Improvements. See TAXES, 7.

1. Occupying claimants are entitled to compensation for, where they derived title from lawful public authority, and have been evicted. *Page v. Davis*..... 675
2. While the intention of the law is that compensation be made for such improvements before a writ of restitution will issue, yet where the application was properly filed, and an amended application made within six months afterwards, party will not be debarred from recovering. *Id.*

Indictment.

1. For burglary, must state name of owner of building, but person in visible occupancy and control may be set out as owner, even though a tenant. *Winslow v. State*..... 311
2. Must aver that breaking was with intent to steal property within building. *Id.*..... 312

Information.

Will be sufficient, where charging part is in language of a criminal statute, descriptive of offense declared to be a crime. *State, ex rel. Bryant, v. Lauver*..... 760

Injunction.

Against attorney. See ATTORNEY, 3.

Insanity. See EVIDENCE, 13.

1. In order to excuse, must incapacitate party to distinguish

right from wrong in regard to particular act complained of. *Burgo v. State*..... 644

2. In an action to cancel a deed on ground of insanity of grantor, while latter was evidently, as a result of domestic trouble, in a state of mind to make a foolish bargain, he nevertheless gave satisfaction in working at his trade, and proof showed that he was not insane. *De Will v. Matison*..... 659

Instructions. See NEGLIGENCE, 2. DAMAGES, 4, 8. LIQUORS, 5.

1. Must be applicable to the evidence. *Sloan v. Coburn*..... 614
2. Objections to, must be made in motion for new trial. *Planck v. Bishop*..... 593
3. Erroneous, where questions of fact are thereby withdrawn from jury. *Morse v. Traynor*..... 599, 602
4. Objections to, not made to district court, cannot be entertained by supreme court. *Downing v. Glenn*..... 325
5. In case stated, *held*, that instruction given, if error at all, was error without prejudice. *Wise v. Newatney*..... 114
6. Must not submit questions not raised by the pleadings. *Bowie v. Spaid*..... 638
7. When designed to include the whole of the case necessary to a verdict, should embody all elements necessary to the conclusion. *Id.*
8. An instruction that the jury should consider "all the facts and circumstances on the trial, giving to the several parts of the evidence such weight as they are entitled to," not objectionable as permitting jury to go outside the evidence. *Fischer v. Coons*..... 403
9. Professing to cover whole case, should include all elements necessarily involved, and within the evidence. *Gilbert v. Saddlery Co*..... 207
10. Correctly expressing the law in the case and covering points not contained in other instructions, should not be refused. *Id.*..... 208
11. An instruction to the effect that any increase in value of certain lots by grading a street and making such lots more accessible, is special to them, properly refused as being too general in its definition of special benefits. *City of Omaha v. Schaller*..... 526
12. In an action by a vendor of stock against purchaser, for falsely weighing the same, an instruction that if the stock was first weighed on defective scales, and if on next day some of it was weighed on incorrect and at once reweighed on correct scales, they should take the difference

- as a basis upon which to ascertain the true weight, did not assume that there were false and true weights in the transaction. *Filley v. Billings*.....552, 553
13. Where, a stock of goods was exchanged for an opera house on March 22, to date from March 1 of same year, and defendant testified that he was to retain the receipts from sales between those dates, an instruction in effect withdrawing such testimony from jury, was erroneous. *Jenne v. Gilbert*..... 462
 14. In such case where fraudulent representations as to value of goods were alleged, court should have stated difference between representations of actual value and mere expressions of opinion. *Id*..... 463
 15. An instruction that defendant by his answer alleged that note sued on was executed and delivered "to the plaintiff," and for the sole purpose of enabling "plaintiff" to procure credit, etc., *held*, erroneous as a misstatement of the issues in the case. *Galloway v. Hicks*..... 535
 16. An instruction that if jury found that defendant had not proved failure of consideration as alleged in his answer, they should find for plaintiff, *held*, error, as substantially withdrawing from jury other issues involved. *Id*..... 536
- Interest.** See MORTGAGE, R. E., 9.
1. Under facts stated, twenty per cent allowed assignee of mortgagee, for taxes paid prior to transfer of note and mortgage, and ten per cent on that paid thereafter. *McCreery v. Schaffer*..... 181
 2. Allowed on amount paid by tax purchaser for non-taxable lands illegally sold by county treasurer, and also on taxes paid thereafter to protect his supposed lien. *Wileon v. Butler County*.....683, 684
- Judgment.** See RES ADJUDICATA, 2.
1. May be set aside after term for irregularity. *Wilkins v. Wilkins*..... 240
 2. May be rendered in excess of verdict. *Volker v. First National Bank*..... 606
 3. When rendered against one who from want of interest cannot maintain the action, will not bar real party in interest from bringing one. *Morse v. Traynor*..... 601
- Jurisdiction.** See COURTS. PROBATE. DIVORCE. CONST. LAW.
1. Supreme court has not and county court has, original, in proceeding to contest election of county attorney. *Bell v. Templin*..... 252

2. County court has, to order sale of leases of school land, without license from district court. *Mulloy v. Kyle*..... 317
3. Of district court in action by national bank where defendant pleaded usury, cannot be questioned in subsequent action under federal statute. *Bollong v. Schuyler Nat'l Bank*..... 286, 287
4. Of justice of the peace or county judge in an action of forcible entry and detainer. *Held*, That while neither could grant affirmative relief reforming the contract, either could receive proof of mistake to show that defendant was not wrongfully in possession. *Lloyd v. Reynolds*..... 68
5. Case will not be dismissed for want of, where transcript and petition in error are filed in supreme court within a year from date of rendition of judgment, and adverse party voluntarily appears therein, after expiration of year. *Id*..... 65

Jury. See TRIAL. CONSTITUTIONAL LAW, 3.

Justice of Peace.

1. Decision of, sustaining an attachment, not conclusive upon defendant. *Hamilton v. Fleming*..... 243, 244
2. In an action of forcible entry and detainer, may receive proof of mistake to show that defendant was not wrongfully in possession. *Lloyd v. Reynolds*..... 68

Landlord and Tenant. See LEASE, 1.

Lessees of building, and not owner, liable for injuries to passengers on elevator. *Oberfelder v. Doran* 127

Lease. See LANDLORD AND TENANT.

1. Mistake in, may be proved before justice of peace, in an action of forcible entry and detainer, to show that defendant was not wrongfully in possession. *Lloyd v. Reynolds*..... 68
2. For any term, is personal property, and vests in executor or administrator. *Mulloy v. Kyle*..... 317
3. Of school land, executed by proper state officer, and containing no provision for purchase by lessee, is personal property, and may be sold by administrator under proper order from county court, without license from district court. *Id*..... 317

License. See LIQUORS

To sell intoxicating liquors, protects licensee only from prosecution by the state; not from an action for injuries resulting from furnishing such liquors. *Jones v. Bates*..... 697

Lien. See TAXES, 3. CONSIDERATION, 4.

1. Of chattel mortgage; priority. *Rawlins v. Kennard*..... 186
2. Claim for, of attorney, must be filed with papers or given to adverse party, in order to be enforced against latter for services; mere existence of contract between client and attorney, would not be notice to adverse party that claim was to be asserted against him. *Elliott v. Atkins*..... 409

Limitation of Action. See TAXES, 12.

While statute does not run in favor of trustee where trust estate is created by contract, it will run in favor of persons charged with trusteeship, where such relation exists by operation of law. *Streitz v. Hartman*..... 49

Liquors. See CONSTITUTIONAL LAW.

1. A married woman and her minor children may join in an action for the loss of means of support caused by furnishing intoxicating liquors to the husband and father. *Jones v. Bates*..... 698
2. The fact that the saloon-keeper furnishing such liquors is liable on his bond, does not prevent an action against him personally. *Id.*..... 697
3. All those who furnished liquors which contributed to the intoxication, may be joined as defendants. *Id.*..... 700
4. A license to sell intoxicating liquors does not protect the licensee from such an action, but only from prosecutions by the state. *Id.*..... 697
5. An instruction that plaintiffs must prove affirmatively that defendants sold intoxicating liquors to the husband, as set out in the petition, properly refused as being too narrow. *Id.*..... 701

Malice.

Defined and discussed. *Jones v. Fruin*.....80, 81

Malicious Attachment.

To sustain action for, necessary to prove malice, damage to plaintiff, and want of probable cause; latter being shown, question of malice still one of fact for jury. *Jones v. Fruin*..... 80

Mandate. See EXECUTION.

Master and Servant. See RAILROADS, 6.

Merger.

Where general owner of real property, receives a deed for the same from holder of tax title, the title conveyed thereby will become merged in that of such general owner. *Wygant v. Dahl*..... 575

Mill-Dams.

1. One or more owners of lands, overflowed by reason of the erection of a mill-dam, may under statute, prosecute proceedings against the owner of such dam; and they are not required, either in pleadings or upon the trial, to negative the existence of other property so injured, or of other parties entitled to damages, or to establish any fact necessary or advantageous to the owner of such mill-dam in a proceeding by him for leave to build, or continue the same. *Pierce Mill Co. v. Kollermann*..... 726
2. An allegation in the petition that land was damaged, being overflowed, *held*, established by proof that the water, being set back by the dam, and caused to stand at a greater depth in the bed of the stream, percolated through the earth so as to rise and stand within one or two feet of the surface. *Id.*..... 729

Mistake.

The claim that note and mortgage sued on, were, by draftsman's error, so executed as to represent a sum one thousand dollars in excess of that actually agreed upon and intended, *held*, to be supported by the overwhelming weight of evidence, and that finding of trial court against such claim, was clearly wrong. *Reid v. Colby*..... 511

Mortgage—Chattels. See HUSBAND AND WIFE, 3.

1. Upon growing grain, not constructive notice to third parties of mortgage of same grain lawfully placed in crib or bin. *Gillilan v. Kendall*..... 86
2. Mortgagor, until foreclosure, has beneficial interest in property, and will convey good title to one who purchases in open market, in good faith, and without notice. *Id.*.... 88
3. By party charged with embezzlement and given to secure debt; where mortgagor retained possession for a year and a half and then delivered property. *Held*, That he had ratified the mortgage. *Sanford v. Sornborger*..... 308
4. Instrument by which a party, to secure a debt, transfers personal property to his creditor, giving him possession and power to sell and account to the debtor for surplus after paying debts so secured, necessary expenses of sale, etc., will be treated as a chattel mortgage, both between the parties themselves, and between grantee and creditors of grantor. *Sloan v. Coburn*..... 612
5. Description of property in, sufficient, when third person is enabled, aided by inquiries which the instrument itself suggests, to identify property. *Rawlins v. Kennard*, 185, 186

6. Where taken by parties who had actual notice of mortgage previously given by same mortgagor, but which they claimed was upon different property, and testimony showed that both mortgages were upon same property, *held*, that right of prior mortgagee was superior. *Id.*..... 186

Mortgage—Real Estate. See HUSBAND AND WIFE, 3.

1. Upon homestead, void, when signed by husband or wife alone. *McCreery v. Schaffer*..... 178
2. Where husband and wife mortgage land which includes homestead, and husband subsequently mortgages land not exempt, and first mortgagee forecloses, making second mortgagees and judgment creditors parties, latter cannot insist that homestead be sold. *Id.*..... 180
3. Where assignee of mortgagee purchased mortgaged property at tax sale, prior to transfer to him of note and mortgage, and latter provides that if mortgagor fail to pay taxes, mortgagee may pay them, and collect legal interest thereon, at same rate as on original debt, assignee, upon foreclosure of mortgage and tax lien, entitled to twenty per cent on amount paid prior to, and ten per cent on that paid after, transfer of note and mortgage. *Id.*..... 181
4. A decree in favor of a junior mortgagee, for the amount of certain judgments, but allowing nothing on his mortgage, is a bar to a second action to foreclose such mortgage. *Haines v. Flinn*..... 385
5. Where a mortgagor was induced to execute a deed to the agent of the mortgagee, not for the purpose of conveying the equity of redemption, but of enabling the agent to sell the land and raise money to discharge the mortgage, *held*, that such deed, though absolute in its terms, as between the parties, was a mortgage only. *Tower v. Fetz*..... 713
6. In such case, proper to show the purpose for which the deed was given, by parol. *Id.*..... 715
7. Given by a vendor, on land other than that sold, to a vendee to indemnify him against a prior mortgage on the land sold, is assignable, and the condition to save plaintiff harmless from suits, etc., being broken, assignee may foreclose in his own name. *Murray v. Porter*..... 293
8. In such case, eviction not necessary to enable assignee to sue. *Id.*..... 294
9. In such case, mortgage not in the nature of a bond for a specific sum, but interest is allowable thereon. *Id.*..... 295

Murder.

1. To sustain conviction of in first degree, necessary to prove deliberation and premeditation. *Anderson v. State*..... 390
2. Where verdict of, in first degree, cannot be sustained, duty of supreme court either to reverse the judgment or reduce the sentence. *Id*..... 390, 391

National Banks.

In an action by, where defendant pleaded usury, he is estopped to deny validity of judgment in his favor, and barred from recovering in subsequent action under federal statute. *Bollong v. Schuyler National Bank*.....286, 287

Negligence. See PERSONAL INJURIES. RAILROADS, 2, 6.

1. In an action for damages on account of injuries received by employe of contractor, resulting from carelessness of those operating a construction train, evidence admissible to show unsafe condition of track where the accident occurred. *C. B. & Q. R. R. Co. v. Clark*..... 652
2. In such case an instruction that it was negligence on part of those in charge of train to run at full speed over any part of the track known by them to be frequented by cattle, *held*, error. *Id*.
3. Where a party was injured by a switch engine in attempting to cross railroad tracks, the view up and down which was obstructed, and no flagman was at the crossing as required by an ordinance, *held*, that, though the evidence was conflicting as to whether a brakeman was on the front car, or a whistle was sounded or a bell rung, there was sufficient to sustain a finding of negligence on part of railroad company. *C. B. & Q. R. R. Co. v. Starnes*..... 634

Negotiable Instruments. See EVIDENCE, 31. INSTRUCTIONS, 15, 16.**Notice.** See LIEN, 2.

1. Chattel mortgage upon growing grain is not, to third parties, of mortgage on same grain, thereafter lawfully placed in crib or bin. *Gillilan v. Kendall* 86
2. Of application for assignment of dower, in case stated, while court disapproved of mode of service, *held*, not subject to collateral attack. *Serry v. Curry*..... 362
3. Failure to enter order directing manner of serving, not fatal to jurisdiction of court. *Id*..... 361

Onus Probandi.

1. Upon daughter, to show actual consideration and good faith of a conveyance to her from her insolvent father for alleged consideration stated in deed. *Plummer v. Rummel*, 147

2. On those claiming rights under a contract for the purchase of grain, to show that it is *bona fide*, when testimony shows doubt whether or not the contract was made with the intention of future delivery. *Sprague v. Warren*..... 338
3. In an action to recover the price of sinking a well, where the answer admitted the allegations of the petition as to labor performed and price to be paid, but sought to attach to them the condition of warranty, as an avoidance of any indebtedness, burden of proof was on defendant to establish such warranty. *Johnson v. Bowman*..... 750

Opinion Evidence. See EVIDENCE, 12.

Ordinances. See CONSTITUTIONAL LAW, 3, 4.

Parent and Child. See GIFT.

Parties. See JUDGMENT, 3.

1. Persons or localities having an interest adverse to contestants are necessary parties in a proceeding to contest an election held to determine the location of a county seat. *Burke v. Perry*.....420, 421
2. A married woman and her minor children may join in an action for the loss of means of support, caused by furnishing intoxicating liquors to the husband and father. *Jones v. Bates*..... 698
3. All those who furnished liquors which contributed to the intoxication, may be joined as defendants. *Id*..... 700
4. Where T. employed M. & B. to sell certain real estate, and latter employed S., who found a purchaser on same terms, and thereupon brought action against T. for his commission, *held*, that his remedy was against M. & B. *Morse v. Traynor*..... 600
5. A proceeding under sec. 14, ch. 57, Comp. Stats., for damages to land, caused by overflow of water by reason of the erection of a mill-dam, need not be commenced by all of the owners of such land. *Pierce Mill Co. v. Kollermann*.... 726

Partition.

1. Action for, can not be maintained by heir or devisee until debts, allowances, and expenses, against estate have been provided for, unless bond, with approved sureties, be given. *Alexander v. Alexander*..... 73
2. Heirs cannot maintain action of, against widow who has a life estate in all lands of which her husband died seised. *Id*

Partnership.

1. Where plaintiff alleged a parol agreement whereby he was

to have a fourth interest in a contract for constructing a railroad, and by his own testimony no attempt was made to agree upon terms of partnership until a considerable portion of the work had been completed; and defendant denied any such contract, though he had directed that only plaintiff's receipt should be recognized in delivering freight: *Held*, That the weight of testimony failed to establish the partnership. *Osborne v. Fitzgerald*..... 516

2. S. sold his interest in a firm to an outsider, the new partnership agreeing to pay all debts of the old, and save S. harmless. The firm's membership afterwards changed a number of times and at each successive transfer the new firm assumed the debts of the old. In an action against M., in whom the partnership property finally vested, by S. alone, to recover for debts of the original firm, paid by himself and W., also of said firm, *held*, that the petition without alleging payment of such debts by S. and W., and assignment to former of W.'s interest, was insufficient. *Meyer v. Shamp*..... 737

Personal Injuries.

1. To passenger on elevator; lessees of building held liable. *Oberfelder v. Doran*..... 127
2. Railroad company liable for, when resulting from negligence of those using its franchises, even where the injuries were received on the line of another company. *Chollette v. O. & R. V. R. R. Co.*.....168, 170
3. Company operating construction train liable for injuries to employe of contractor, resulting from carelessness of train hands; contractor having no authority over latter. *C. B. & Q. R. R. Co. v. Clark*..... 654
4. In an action for damages by reason of, an instruction that if jury found for plaintiff they could take into consideration suffering, loss of time, and impaired business ability, sustained as applicable to the evidence. *C. B. & Q. R. R. Co. v. Starmer*.....634, 635

Petition.

1. For recovery of attached property, *held*, sufficient. *Hamilton v. Fleming*..... 242
2. Though informal, *held*, sufficient when assailed after judgment. *Downing v. Glenn*..... 324
3. For assignment of dower; failure of to allege that right to dower "is not disputed by heirs or devisees," not fatal to jurisdiction of court. *Serry v. Curry*..... 361
4. Where charging several defendants jointly with negli-

gently and carelessly operating a railroad construction train, not error for district court to overrule motion to require a more specific statement by showing which of defendants was operating the road; or if all, whether jointly or severally, etc. *C. B. & Q. R. R. Co. v. Clark* 649

5. S. sold his interest in a partnership to an outsider, the new firm assuming the debts of the old, and the same agreement being made at each of several subsequent changes in the membership. In an action by S. to recover for debts of the original firm paid by himself and W., also of said firm, *held*, that the petition, without alleging payment of such debts by S. and W., and assignment to former of W.'s interest, was insufficient. *Meyer v. Shamp*..... 737

Pleading. See MILL DAMS. PARTIES. PETITION. GENERAL DENIAL. COMPLAINT, 3, 4. INFORMATION.

1. Plea of "not guilty" to charge of bastardy being once entered on first trial, need not be repeated on second trial. *Planck v. Bishop*..... 591
2. Objections to, should be specifically pointed out; and motion to require "plaintiff to make the allegations in his petition more definite and certain," too general to assign error upon. *Fischer v. Coons*..... 401

Practice. See CRIMINAL LAW. EXCEPTIONS. DISMISSAL. COMPLAINT. COURTS. ERROR, 2, 3. EVIDENCE, 11, 21. GENERAL DENIAL, 3. COURTS—SUPREME, 2, 3. INSTRUCTIONS, 1, 2, 4, 6. DEPOSITIONS, 2. PLEADING, 2. MALICIOUS ATTACHMENT, 1.

1. Ordinarily, where the clear weight of testimony is against verdict, judgment will be reversed. *Brown v. Smith*..... 379
2. Motion for dismissal in supreme court should be filed before preparation and service of briefs in case; otherwise, ordinarily, will be disregarded. *Lloyd v. Reynolds*..... 65

Principal and Agent. See ESTOPPEL, 1. COUNTY BOARD, 4. CONVEYANCE.

1. An agent who sells goods subject to approval of principal, is not thereby a general agent; and proof of what such agent said or did in relation to the goods after the order has been filled, is not admissible against principal without proof of authority to bind him. *Cleveland Store Co. v. Hovey*..... 629
2. Where T. employed M. & B. to sell certain real estate on terms specified, and latter employed S., who found a pur-

chaser on same terms, and thereupon brought action against T. for his commission, and was defeated, *held*, that judgment against S. would not bar recovery by M. & B., and that remedy of S. was against latter party.

Morse v. Traynor..... 600

Principal and Surety. See GUARANTY. STATUTE OF FRAUDS.

Privileged Communication. See SLANDER.

Probate. See NOTICE. DOWER.

Publication of notice of, once a week for three weeks, sufficient to give court jurisdiction to determine the validity of a purported will. *Alexander v. Alexander*..... 74

Railroads. See NEGLIGENCE. TAXES, 8-10.

1. Cannot, under sec. 4, art. 11, Const., limit their liability as common carriers, by special agreement. *M. P. R. R. Co. v. Vandeventer*..... 323
2. Liable for accidents occurring on lines of another company where contract is for continuous transportation. *Chollette v. O. & E. V. R. R. Co.*..... 170
3. Fencing of, governed by sec. 1, art. 1, chap. 72, Comp. Stats., and not by sec. 18, art. 2, chap. 2, which applies to lands alone. *C. B. & Q. R. R. Co. v. James*..... 192
4. When incorporated under the laws of this state, can not (without legislative enactment) by transfer of franchises, be relieved of liability for acts of those operating their lines. *Chollette v. O. & E. V. R. R. Co.*..... 168
5. Witness need not be an expert to testify to rate of speed at which a train was running at time of an accident. *C. B. & Q. R. R. Co. v. Clark*..... 650, 651
6. Company operating construction train liable for injuries to employe of contractor, resulting from carelessness of train hands, the contractor having no authority over latter. *Id.*..... 654

Ratification.

Delivery is, of chattel mortgage, given by party charged with embezzlement, to secure the debt on property retained in possession of mortgagor, for a year and a half. *Sanford v. Sornborger*..... 308

Real Estate. See CONTRACT, 1, 7, 10. SPECIFIC PERFORMANCE. VENDOR AND VENDEE. DAMAGES. TAXES.

Reduction of Sentence.

1. Under conditions provided for in section 509a of Crim. Code, is a matter of right. *Anderson v. State*..... 392

2. Statute applies to all crimes and all grades of murder. *Id.* 391
3. Duty of supreme court to order, or to reverse judgment, under circumstances provided for in statute. *Id.*..... 392

Remittitur.

- Required as a condition to affirmance of judgment. *Boston Tea Co. v. Brubaker*..... 414
- Everson v. Graves*..... 266

Replevin.

1. Where property is replevied from an officer who holds it by virtue of an order of attachment, and replevin suit is decided in officer's favor, his measure of damages is amount due attachment plaintiffs at time of levying order of replevin, (within value of property,) and not including writs of attachment received after he had lost possession. *Sloan v. Coburn*.....608, 609, 610
2. Where a sheriff seized property sought to be replevied, and retained the same in his possession until after a settlement had been arranged between the parties to the replevin suit, and then delivered it to a third party without defendant's knowledge, *held*, that he was liable, and that neither the execution of the replevin bond, nor the direction of plaintiff to deliver the property, would constitute a legal excuse. *Wilcox v. Brown*..... 756

Res Adjudicata. See JUDGMENT, 3.

1. Decision of county board, having jurisdiction of subject-matter and parties, conclusive, unless reversed or modified in mode provided by law. *Burke v. Perry*..... 419
2. A decree in favor of a junior mortgagee, for the amount of certain judgments, but allowing nothing on his mortgage, is a bar to a second action to foreclose such junior mortgage. *Haines v. Flinn*..... 385
3. A judgment or ruling of the supreme court, distinctly made, will be held to be the law of the case, without regard to its intrinsic merit or to the number of times it is brought before the court. *Meyer v. Shamp*..... 731

Roads. See COUNTY BOARD, 3.

Order of county board declaring section lines to be, establishes a public highway, and can only be vacated as provided by statute. *McNair v. State, ex rel. Powers*..... 261

Sale. See VENDOR AND VENDEE.

Where vendees were dissatisfied with goods received, *held*, that good faith required them to notify vendor of such dissatisfaction, with reasonable promptness. *Cleveland Store Co. v. Hovey*..... 628

School Land. See CONTRACT, 10. LEASE, 3.

Option given lessee of, to purchase under conditions prescribed by law, not a contract to purchase real estate under sec. 94, ch. 23, Comp. State., and county court may order sale of such lease without license from district court. *Mulloy v. Kyle* 317

Service by Publication. See DIVORCE, 3.**Set-Off and Counter-Claim.**

1. Award sustained as. *Doane College v. Lanham*..... 445
2. Claim of defendants in nature of, for damages growing out of alleged fraudulent representations of plaintiff as to amount and value of personal property sold with farm, as well as for damages arising from failure to obtain immediate possession of said farm and personal property, *held*, inadmissible, and rightly rejected by trial court. *Reid v. Colby*..... 480

Sheriff.

1. Detention by, of attached property which is exempt, a trespass. *Hamilton v. Fleming*..... 244
2. In an action against, for failing to sell certain personal property levied upon under an execution, *held*, upon facts proved, that sheriff was not liable. *Burton v. Care*..... 188
3. Where a sheriff seized property sought to be replevied, and retained the same in his possession until after a settlement had been arranged between the parties to the replevin suit, and then delivered it to a third party without defendant's knowledge, *held*, that he was liable, and that neither the execution of the replevin bond, nor the direction of plaintiff to deliver the property, would constitute a legal excuse. *Wilcox v. Brown*..... 756

Slander.

In an action for, by city attorney against mayor of city of second class, for using the following language to city council: "He is unfit to hold the office of city attorney; his opinion is too easily warped for a money consideration:" *Held*, That the statement, if made in good faith, was privileged, and that the words were not actionable *per se*. *Greenwood v. Cobbey*.....455, 456

Specific Performance.

1. Where one contracts to sell land, and, without complying with contract, sells to third party, who has notice of the prior agreement, first vendee may compel a conveyance to him. *Veith v. McMurtry*..... 352
2. A vendee of real estate took possession, agreeing to construct a building thereon, and to pay purchase price at

stated periods. By the terms of the written contract, if payments were not made at stipulated time, nor building constructed, the vendee should forfeit all right to the property, and the vendor take possession. In an action by the vendee for specific performance, wherein it appeared that he had not complied with terms as to time of payment, but there was sufficient evidence to sustain a finding that by a later parol agreement said time was extended, and that the vendee was to pay the whole purchase price instead of the partial payments, and that he had tendered said price within the extended time, *held*, that he was entitled to a specific performance. *Izard v. Kimmel*..... 578

Statute of Frauds.

Inducements held out in letter, written by surety, who had been given bill of sale of certain property by, and assumed other debts of, his principal, to latter's judgment creditor upon which he refrained from issuing execution, *held*, to constitute a binding agreement under the statute. *Kenny v. Hews*..... 221

Statute of Limitations. See TAXES, 12. LIMITATION OF ACTION. TRUSTS, 4.

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LAWS 1857.

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Dower, sec. 1, ch. 17. *Serry v. Curry*..... 363.

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——, sec. 83, ch. 16. <i>C. K. & N. E. R. R. Co. v. Hazels</i>	368
——, sec. 97, ch. 16. <i>Id.</i>	
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County commissioners, secs. 53, 54, 55, art. 1, ch. 18. <i>State,</i> <i>ex rel. Nichols, v. Field</i>	397, 398
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Descent; order of, sec. 30, ch. 23. <i>Alexander v. Alexander</i> ...	71
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——, setting off, sec. 9, ch. 23. <i>Id.</i>	362
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Burglary, sec. 48. <i>Winslow v. State</i>	310
Complaint, sec. 286. <i>State, ex rel. Bryant, v. Lauver</i>	759
Murder, secs. 3, 4. <i>Anderson v. State</i>	389, 392
Reduction of sentence, 509a. <i>Id.</i>	388

Sunday. See CONSTITUTIONAL LAW, 4.

Wherean ordinance prohibiting transaction of certain kinds of business on, excepts those who conscientiously observe the seventh day, the fact that an individual believes the seventh day is the Sabbath, but fails to observe it as such, does not bring him within the exception. *Lieberman v. State*..... 469

Supervisors. See COUNTY BOARD.

1. Are township officers only. *State, ex rel. Godard, v. Taylor*.. 586
2. Resignation when made should be presented to the clerk of the proper township, and vacancy caused thereby may be filled by appointment as provided by sec. 103, ch. 26, Comp. Stats.; or on failure thereof, by election. *Id.*..... 585, 586, 587, 588

Taxes.

1. Paid by assignee of mortgagee under facts stated, entitle him to interest at twenty per cent on amount paid prior to transfer of note and mortgage, and at ten per cent on that paid after. *McCreery v. Schaffer*..... 181
2. Where county treasurer sells for taxes land not taxable, tax purchaser may recover from county, amount paid by him with interest thereon. *Wilson v. Butler County*....683, 684
3. In such case, where taxes are assessed and levied on the land from year to year afterwards, tax purchaser may pay such taxes to protect his supposed lien, and upon failure of his interest in the land, may recover amount paid, with interest, from the county. *Id*..... 683.
4. In such case, purchaser may presume that property was taxable and need make no further examination as a condition to bringing action against county. *Id.* .
5. County board has power, under sec. 70, ch. 77, Comp. Stats., to equalize valuations between different precincts or townships of the county, and no complaint of inequality nor notice to the party to be affected, is required. *State, ex rel. Lincoln, Land Co., v. Edwards*..... 705-
6. A complaint is necessary where a party is aggrieved, (1) by his own assessment; (2) by the low assessment of another; in which case, notice must be given the party to be affected. *Id.*
7. The words "such tax titles" and "such tax deeds" in the proviso of sec. 11, ch. 63, Comp. Stats., 1887, do not relate to words of like import, previously occurring in the chapter; and the word "such" being restrictive in its meaning, was evidently designed to apply to a particular class of tax deeds not described, and not to tax deeds generally. One claiming title under a tax deed, and making lasting and valuable improvements on the land, paying taxes, etc., is entitled to compensation for the same. *Page v. Davis*.....673, 674, 675-
8. Real estate used for road-bed and right of way purposes, where no more land has been taken than the necessities of the present or immediate future demand, is, under statute, to be assessed by state board, though tracks may not be laid on all of it. *Red Willow County v. C. B. & Q. R. R. Co.*..... 669-
9. All property outside of right of way and depot grounds should be assessed by local assessor. *Id.*
10. A roundhouse, unless also used as a repair shop, should be assessed by local assessor. *Id.*

11. Where the general owner of real property receives a deed for the same from holder of the tax title, the title conveyed thereby, will become merged in that of such general owner. *Wygant v. Dahl*..... 575
12. In an action to remove from real property cloud cast by tax title, and to quiet title in plaintiff, it appeared that he and those under whom he claimed, had been in exclusive, uninterrupted possession for more than ten years, and that the taxes had accrued and tax deed had been executed for the same period before bringing the action; *held*, that as plaintiff sought equitable relief from said taxation and tax deeds, he must, notwithstanding statute of limitations, do equity by paying such taxes and interest, as a condition of relief. *Id.*..... 573.
13. In such action where a decree is rendered upon an answer or cross-petition of defendant, for such taxes, interest, and disbursements, or either of them, an attorney's fee equal to ten per cent thereon, will be awarded. *Id.*...566, 567, 568, 569, 570, 571
14. A tax purchaser of land, shown to have been subsequently redeemed, though there was no proof that the party redeeming had authority from the one in whose name payment was made, not entitled to a writ of mandamus to compel county treasurer to execute a deed, latter being presumed to have been shown the necessary authority. *State, ex rel. Nelson, v. Harper*..... 764
15. Where party redeeming failed to pay printer's fees, as required by secs. 123 and 125, ch. 77, Comp. Stata, but it is not shown that proof has been left with treasurer of amount paid by tax purchaser for publication of notice, such failure does not avoid the redemption. *Id.*..... 766

Time.

- Of performance of written contract, may be extended by subsequent parol agreement and no new consideration is necessary especially where mutual acts are to be performed by parties. *Izard v. Kimmel*..... 57

Title. See ACTION QUIA TIMET. MERGER. TAXES. TRUSTS.

Township Organization. See SUPERVISORS.

Trial. See EVIDENCE. INSTRUCTIONS. PLEADING. VERDICT. CRIMINAL LAW.

1. A question of reasonable time within which a purchaser of school-land leases was required to go upon the land and ascertain if it was of guaranteed quality, is a question of fact, it arising on parol evidence and there being a dispute as to the facts. *Hoxie v. Kams*..... 621

2. Where improper questions are submitted to a jury for special findings, at the request of a party afterwards complaining, and jury is discharged without answering the same, it is error without prejudice. *M. P. E. R. Co. v. Vandevanter*..... 235

Trusts.

1. A trust raised by a deed, absolute in its terms, but which testimony shows was given to secure payment of money, may be proved by parol. *Tower v. Fetz.*..... 713
2. When face of deed from trustee to purchaser shows nothing contrary to power contained in deed of trust, title of subsequent purchaser, who has no notice in fact of any irregularity in sale by trustee, cannot be questioned. *Streitz v. Hartman*..... 48
3. In case stated, *held*, that plaintiff had no such equities as against subsequent purchasers, with or without notice, as would entitle him to ignore unconveyed lots and recover title to those previously sold. *Id.*..... 50
4. While the statute of limitations does not run in favor of trustee where trust is created by contract, yet where such relation exists by operation of law, statute will run in favor of persons charged with such trusteeship. *Id.*..... 49

Usury. See EVIDENCE, 21.

Where party avails himself of defense of, in an action by a national bank, he is estopped to deny the validity of the judgment, and latter is a bar to further recovery under provisions of the federal statute. *Bollong v. Schuyler National Bank*.....286, 287

Vendor and Vendee. See MORTGAGE, R. E., 7. SALE SPECIFIC PERFORMANCE.

1. After a vendee had taken possession, and the terms of the written contract of sale had been changed by parol agreement, a conveyance by the vendor to a third party, was invalid as against first vendee. *Izard v. Kimmel*.....56, 58
2. Where the vendor, who had previously given an option on certain lots, to expire February 15, telegraphed the vendee on the morning of February 9, that the offer must "expire to-night," to which the vendee telegraphed acceptance on the same day, stating that he sent \$500 of the \$3,500 asked, *held*, (1) that vendee had until the night of the 9th to accept; (2) that the acceptance of the offer of \$3,500 cash was unconditional, and that the \$500 tendered at once, was in the nature of a forfeit to show good faith. *Veith v. McMurtry*..... 347

Verdict.

1. Not excessive, under the evidence. *C. B. & Q. E. R. Co. v. Starnes*..... 635
Musselman v. Barker..... 745
2. Found to be excessive, and remittitur ordered.
Ecerson v. Graves..... 266
Boston Tea Co. v. Brubaker..... 414
3. Where in favor of plaintiff, but showing allowance of part of defendant's set-off, not error for court to refuse to order jury to find specially amount allowed defendant. *Everson v. Graves*..... 264

Voluntary Payment.

Payment of taxes, to protect a supposed lien, where non-taxable lands have been assessed, is not. *Wilson v. Butler County*..... 683

Wagering Contract.

1. Where the testimony showed simply an agreement to pay the difference between the contract price, and that at a stated time, with no intention of future delivery, held, a mere wager, and unenforceable. *Sprague v. Warren*..... 335
2. Where the defense is that the contract is a wagering one, it is the duty of courts to go behind the contract and examine the circumstances of its formation. *Id.*

Waiver.

Condition precedent may be waived after default ; in which case forfeiture provided for as result of non-performance cannot be enforced. *Izard v. Kimmel*..... 557

Warrant. See COMPLAINT. INFORMATION.

Warranty.

When alleged by defendant in an action to recover the price of sinking a well, burden of proof is on him to establish. *Johnson v. Bowman*..... 750

Weights and Measures: See INSTRUCTIONS, 12. EVIDENCE, 12.

A vendor of stock is entitled to have the same honestly weighed, and a promise by him after a false weighing, to give purchaser a bonus for a correct reweighing, is gratuitous. *Filley v. Billings*..... 551, 554

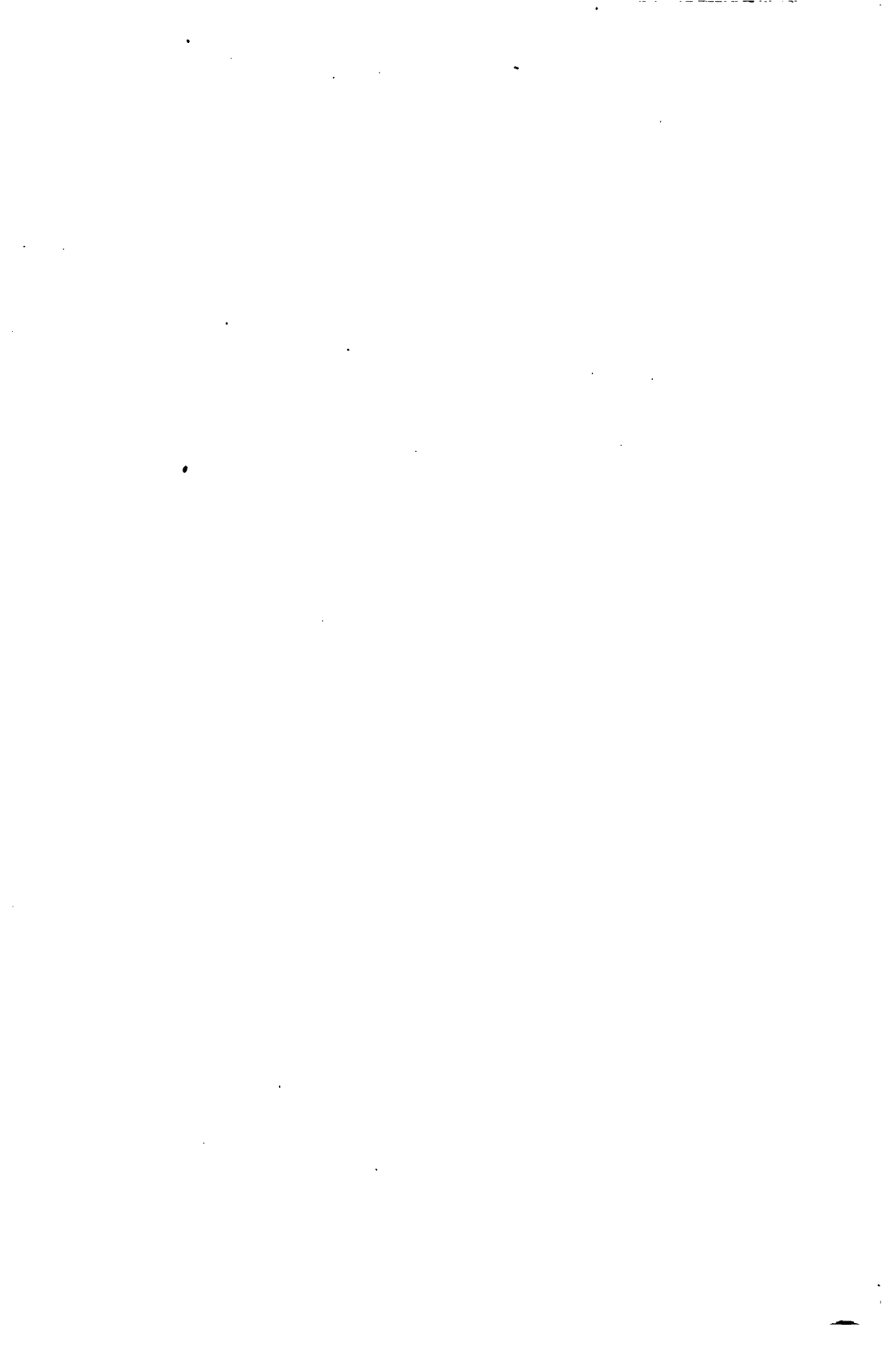
Wills. See ADMINISTRATION OF ESTATES.

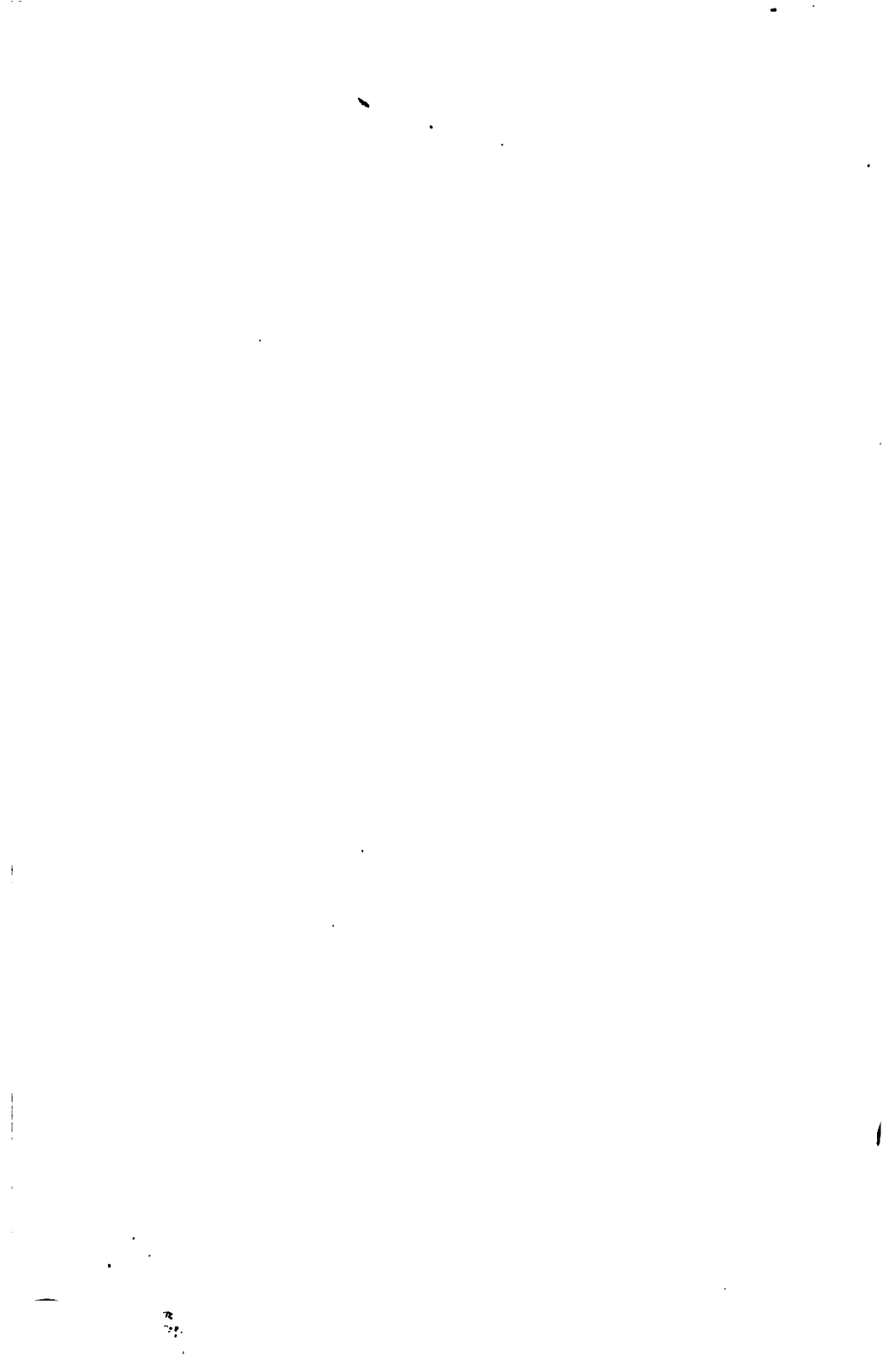
Publication of notice of probate once a week for three weeks, held, sufficient under statute to give the court jurisdiction to determine the validity of a purported will. *Alexander v. Alexander*..... 72

Witnesses. See EVIDENCE.

Work and Labor. See CONTRACT. ONUS PROBANDI, 3.

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